TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~622~~. 220.

DAVIDSON STEAM SHIP COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED MARCH 12, 1906.

(20,124.)

(20,124.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 622.

DAVIDSON STEAM SHIP COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1905, of said Court, begun and held at the United States Court House in the City of Cheyenne, Wyoming, on the first Monday in September, to-wit: the fourth day of September, A. D. 1905, and which said September Term, 1905, was adjourned from the City of Cheyenne, Wyoming, to the City of St. Paul, Minnesota, as provided by law, before the Honorable Walter H. Sanborn, Honorable William C. Hook and Honorable Elmer B. Adams, Circuit Judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twenty-eighth day of November, A. D. 1904, a transcript of record, pursuant to a writ of error directed to the Circuit Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Davidson Steam Ship Company was Plaintiff in Error and The United States of America was Defendant in Error, which said transcript of record as printed pursuant to the stipulation of counsel for the respective parties for use of the Court upon the hearing of said cause is in the words and figures following, to-wit:

a The United States Circuit Court of Appeals, Eighth Circuit.

The Davidson Steam Ship Company, Appellant
vs.
The United States of America, Appellee.

Stipulation.

It is hereby stipulated between the Attorneys for Apellant and the Attorneys for Appellee, that those portions of the record included in the red pencil brackets on the margin of the record as forwarded by the Clerk of the District Court for the District of Minnesota, Fifth Division, may be omitted from the printed record, and the Clerk of said Court of Appeals is hereby directed to so omit said portions from the printed record in said appeal. The balance to be printed.

Duluth, Minn., Oct. 28th, 1904.

H. R. SPENCER,
Attorney for Appellant.
CHAS. C. HOUPT,
Attorney for Appellee.

2149. Davidson Steam Ship Co., Plff. in Error, vs. United States of America. Stipulation as to printing record. Filed Nov. 28, 1904. John D. Jordan, Clerk.

1 United States Circuit Court District of Minnesota, Fifth Division.

The United States of America, Plaintiff,
No. 19 U. S. vs.
The Davidson Steamship Company, Defendant.

Appearances.

Hon. Charles C. Houpt, U. S. Attorney, St. Paul, Minn., and Al J. Smith, Esq., Asst. U. S. Attorney, St. Paul, Minn., for Plaintiff.

C. E. Kremer, Esq., Chicago, Illinois, and Searle & Spencer, Duluth, Minn., for Defendants.

Pleas in the United States Circuit Court, District of Minnesota, Fifth Division, in the above entitled cause.

Be It Remembered, That on the 1st day of October, A. D. 1904, there was filed with the Clerk of said Court at his office in Duluth, said District and Division, a stipulation by and

between the Attorneys for the respective parties hereto, to omit from this record certain papers filed in said cause; which said stipulation is, in words and figures, as follows, to-wit:

The United States Circuit Court, District of Minnesota, Fifth Division.

The United States of America,

vs.

The Davidson Steamship Company.

It is hereby stipulated that the following papers may
2 be omitted from the record in appeal in above entitled cause:

Note of Issue; Objections to Taxation; Taxation of Costs; Notice to Produce Letters; Jury List; Stipulation as to use of Prior Evidence, filed July 1, 1904; Motion for New Trial, filed April 7, 1904; Verdict for Plaintiff, filed Oct. 27, 1903; Jury List, filed Oct. 21, 1903; Stipulation as to use of evidence, filed Oct. 3, 1903; Stipulation for Continuance, filed Apr. 17, 1903; Plaintiff's Exhibit 2, filed Oct. 24, 1902; Plaintiff's Exhibit 1 filed Oct. 24, 1902; Defendant's requests, filed Oct. 23, 1902; Jury List, filed Oct. 21, 1902; Stipulation as to use of evidence, filed Oct. 6, 1902; Order Granting New Trial, filed July 29, 1902; Affidavit of Costs, filed June 7, 1902; Motion for New Trial, filed May 21, 1902; Defendant's Requests, filed May 19, 1902; Plaintiff's Exhibit F, filed May 19, 1902; Jury List, filed May 17, 1902; Notice of Trial, filed May 3, 1902; Praecipe, filed, Apr. 1st, 1902.

CHARLES C. HOUPT,
Atty. for Plaintiff.
H. R. SPENCER,
Atty. for Defendant.

Dated Oct. 1, 1904.

Indorsed: Stipulation Omitting certain documents from the record. Filed Oct. 1st, 1904. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy.

That on the 18th day of April, A. D., 1902, there was filed with said clerk the Summons in said cause, in the words and figures following, to-wit:

3 United States of America.

District of Minnesota,
Fifth Division—ss.

In the Circuit Court of the United States for the District of Minnesota.

United States of America, Plaintiff,
against
The Davidson Steamship Company, Defendant.

Summons.

The President of the United States of America, to the Defendant above named—Greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the Clerk of this Court, in Duluth, County of St. Louis and State of Minnesota, and file your answer in said Clerk's office, within Twenty days after the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid, the Plaintiff will take judgment against said defendant for the sum of Four thousand and twelve and 50-100 ($4012.50) Dollars, interest thereon since July twenty-fourth (24th) 1901, and the costs and disbursements of this action.

For the Marshal of the District of Minnesota to execute.

Witness: The Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America this 1st day of April A. D. 1902. Issued at my office in the City of St. Paul, under the seal of said Circuit Court. the day and year last aforesaid.

[Seal of said Court]

4

HENRY D. LANG, Clerk.

FREDERICK N. DICKSON,
Asst. U. S. Atty, and Plaintiff's Attorney.

United States of America,
District of Minnesota—ss.

I hereby certify and return that I served the annexed Summons on the therein-named defendant by handing to and leaving a true and correct copy thereof with G. A. Tomlinson, Vice President and Agent of the Davidson Steampship Co. personally at Duluth, in said District on the 2nd day of April A. D. 1902.

WILLIAM H. GRIMSHAW,
U. S. Marshal.
By Geo. J. Mallory, Deputy.

Indorsed: Summons. Returned and filed Apr. 18, A. D. 1902. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy.

That the record of the trial of said cause as recorded in the Term Minutes of said Court, is in the words and figures, as follows, to-wit:

5 United States Circuit Court, for the District of Minnesota. Term Minutes July Term, A. D. 1904, July 12, 1904.

Tuesday morning, ten o'clock.

Court was duly opened and proclamation made.

Present: Hon. Page Morris, Judge.
Hon. Charles C. Houpt, U. S. District Atty.
Hon. William H. Grimshaw, U. S. Marshal,
Henry D. Lang, Clerk.

The United States of America,
No. 19 U. S. vs.
Davidson Steamship Company.

This cause being regularly called for trial in its order on the calendar, the parties appear by their respective Attorneys, Mr. Charles C. Houpt appearing on behalf of the plaintiff and Messrs. C. E. Kremer and Searle & Spencer appearing on behalf of the defendant; Whereupon, on motion of the said Plaintiff's attorney, it is, by the Court

Ordered: That a Jury come, to-wit:

E. W. Halkney,	Jesse G. Brooks,
Alvin Cook,	O. J. Gates,
A. H. Turner,	John Schmidt,
John Graham,	S. H. Carter,
John K. Lee,	Charles J. Martin,
J. B. Bean,	J. N. Marr.

twelve good and lawful men who are duly sworn to try the issues joined in this cause and the trial thereof is there-
6 upon proceeded with as follows, to-wit:

Mr. Charles C. Houpt opens the case to the jury on behalf of the plaintiff, and upon the consent of counsel Mr. H. R. Spencer at this time opens the case to the jury on behalf of the defendant. Upon the agreement and consent of counsel, it is, by the Court

Ordered: That the testimony of certain witnesses produced, sworn and examined upon a former trial of this cause may be read in evidence upon this trial.

Thereupon, the testimony of John McAvoy, a witness on behalf of the plaintiff is offered and read in evidence.

The testimony of Arthur E. Powell, a witness on behalf of the plaintiff is offered and read in evidence.

The testimony of Samuel Wetton, a witness on behalf of the plaintiff is offered and read in evidence.

The testimony of John Krey, a witness on behalf of the plaintiff is offered and read in evidence.

The testimony of Frank Heinrich, a witness on behalf of the plaintiff is offered and read in evidence.

And the trial of said cause not being concluded at the hour of adjournment, it is, by the Court

Ordered: That further proceedings herein be and the same hereby are postponed and continued until tomorrow morning at ten o'clock.

Wednesday morning, ten o'clock, July 13, 1904.

7 This day come again the parties to this cause by their respective attorneys, also the Jury sworn to try the same and the trial thereof is thereupon resumed and proceeded with as follows, to-wit:

The testimony of David D. Gaillard, a witness produced, sworn and examined on behalf of the plaintiff on a former trial of this cause is offered and read in evidence.

The testimony of A. R. Porter, a witness produced, sworn and examined on behalf of the plaintiff on a former trial of this cause is offered and read in evidence.

The testimony of Walter L. Fisk, a witness produced, sworn and examined on behalf of the plaintiff on a former trial of this cause is offered and read in evidence.

The testimony of Hugh Steele, a witness produced, sworn and examined on behalf of the plaintiff on a former trial of this cause is offered and read in evidence.

The testimony of Francis L. McDonald, a witness produced sworn and examined on behalf of the plaintiff on a former trial of this cause is offered and read in evidence.

The testimony of David L. Gaillard recalled and examined on behalf of the plaintiff on a former trial of this cause is offered and read in evidence.

The testimony of B. F. Howard, a witness produced, sworn and examined on behalf of the plaintiff on a former trial of this cause is offered and read in evidence.

The testimony of C. O. Flynn, a witness produced, sworn and examined on behalf of the plaintiff on a former trial of this cause is offered and read in evidence.

8 The plaintiff here offers certain documentary testimony in evidence.

And here the plaintiff rests.

The defendant now moves the Court to instruct the Jury to find and return into Court a verdict in its favor and without hearing any arguments the Court denies said motion.

The testimony of John McAvoy a witness produced, sworn and examined on behalf of the defendant on a former trial of this cause, is offered and read in evidence.

The testimony of Robert Gaskell, a witness produced, sworn and examined on behalf of the defendant on a former trial of this cause, is offered and read in evidence.

Frank Heinrich is called, sworn and examined as a witness on behalf of the defendant.

John Krey is called, sworn and examined as a witness on behalf of the defendant.

The testimony of Henry Leisk, a witness produced, sworn and examined on behalf of the defendant on a former trial of this cause is offered and read in evidence.

The testimony of Edgar Chisholm, a witness produced, sworn and examined on behalf of the defendant on a former trial of this cause, is offered and read in evidence.

The testimony of James B. Lyons, a witness produced, sworn and examined on behalf of the defendant on a former trial of this cause, is offered and read in evidence.

The testimony of Charles H. Frank, a witness produced, sworn and examined on behalf of the defendant on a former trial of this cause is offered and read in evidence.

9 The testimony of Christopher Cox Allen, a witness produced, sworn and examined on behalf of the defendant on a former trial of this cause is offered and read in evidence.

The testimony of George M. Wise, a witness produced, sworn and examined on behalf of the defendant on a former trial of this cause is offered and read in evidence.

The testimony of H. W. Richardson, a witness produced, sworn and examined on behalf of the defendant on a former trial of this cause is offered and read in evidence.

And the trial of said cause not being concluded at the hour of adjournment, it is, by the Court

Ordered: That further proceedings herein be and the same hereby are postponed and continued until tomorrow morning at ten o'clock.

Thursday morning, July 14th, 1904, ten o'clock.

This day come again the parties to this cause by their respective attorneys, also the jury sworn to try the same, and the trial thereof is thereupon resumed and proceeded with as follows, to-wit:

John Krey is recalled and further examined as a witness on behalf of the defendant.

David J. Giardin is called, sworn and examined as a witness on behalf of the defendant.

Certain documentary testimony is offered in evidence on behalf of the defendant.

10 And here the defendant rests and the testimony is closed.

The defendant here again moves the Court to instruct the jury to find and return into Court a verdict in its favor, which said motion is by the Court, without hearing argument, denied.

Mr. C. E. Kremer sums up the case to the jury on behalf of the defendant.

* * *

Mr. C. E. Kremer resumes and concludes summing up the case to the jury on behalf of the defendant.

Mr. Charles C. Houpt sums up the case to the jury on behalf of the plaintiff.

The Court charges the Jury on the law governing the issues joined in this cause.

Zenas L. Potter is sworn as an officer to take charge of the jury and they retire to consider their verdict.

Upon the agreement and consent of the attorneys for the respective parties hereto, it is by the Court

Ordered: That if the Jury agree upon a verdict during the recess of Court, they may seal and return the same by their foreman upon the incoming of Court thereafter.

Friday morning, July 15, 1904, ten o'clock.

The Jury in this cause having heretofore retired to consider their verdict, come now into Court and by their foreman, under seal, return their verdict herein, which is in the words and figures following, to-wit:

11 "We the Jury in the above entitled cause find for the plaintiff and assess its damages at the sum of [Fourt] Thousand and Twelve & 50/100 Dollars, ($4012.50).

Dated this 14th day of July, 1904.

JOHN SCHMIDT, Foreman."

It is therefore in accordance with said verdict now, by the Court

Considered, Ordered and Adjudged That the United States of America, the plaintiff herein do have and recover of and from the Davidson Steamship Company, the defendant herein the sum of Four Thousand and twelve and 50/100 ($4012.50/100)

Dollars so found to be due by the Jury together with the costs and disbursements of this action to be taxed and that it have execution therefor.

On motion of the defendant's attorneys, the plaintiff's attorney consenting thereto, it is, by the Court

Ordered: That execution herein and all other proceedings except the taxation of costs and the entry of judgment therefor, be and the same hereby are, stayed for the period of forty-two (42) days to enable the defendant to prepare and present a bill of exceptions and make a motion for a new trial.

The defendant gives notice of motion to set aside the verdict herein, and for judgment for the defendant notwithstanding the said verdict.

Saturday morning, October 1, 1904, ten o'clock.

This cause coming on to be heard upon the motion of defendant heretofore filed for judgment in its favor, notwith-
12 standing the verdict, and if that be denied that the Court set aside the verdict herein and grant a new trial, the plaintiff appears by Chas. C. Houpt, Esq., its attorney, and the defendant by H. R. Spencer, Esq.; and after hearing the arguments and statements by the respective counsel, and being fully advised in the premises, the court denies said motion.

Counsel for defendant thereupon presents to the Court a proposed Bill of Exceptions in said cause, counsel for plaintiff consenting thereto; and after an examination of said document, it is, by the Court, duly settled allowed and signed as and for a bill of exceptions in said cause. Whereupon counsel for defendant files a petition for a writ of error and assignments of error, and it is, by the Court

Ordered: That a Writ of Error be and hereby is allowed, to have reviewed in the United States Circuit Court of Appeals, for the Eighth Circuit, the Judgment heretofore entered herein, and that the amount of bond on said writ of error be and is hereby fixed at $5000.00. Upon the filing of a bond in that amount to be approved by the Clerk of said Court, a stay of execution is hereby ordered until otherwise ordered, said bond to act as a supersedeas bond as well as a bond for costs.

That on the 1st day of October, A. D. 1904, there was filed with said Clerk the Bill of Exceptions in said cause as approved settled, allowed and signed by the Hon. Page Morris, the Judge before whom said cause was tried; which said Bill of Exceptions is, in words and figures as follows, to-wit:

13 United States Circuit Court, District of Minnesota, Fifth Division.

United States of America, Plaintiffs,
vs.
The Davidson Steamship Company, Defendant.

For complaint in the action above entitled the plaintiffs allege:

That at and during all the times hereinafter mentioned the above named defendant was, and it still is a corporation duly organized, created and existing under and by virtue of the laws of the State of Minnesota, and during all said times was the owner of a large number of vessels of various kinds, and engaged in the navigation of such vessels, and in the transportation of freight therein to and from the various Ports of the Great Lakes, and among such vessels, owned a certain two masted wooden steamer, commonly known and designated as the Shenandoah, which was registered at the Port of Duluth in the District of Minnesota, and which was at the time hereinafter mentioned, employed and used by the said defendant, in the transportation of iron ore and other freight from the Port

14 of West Superior, Wisconsin, to the Port of Cleveland, Ohio, and at the time of the happening of the collision which is hereinafter set forth, said Steamer Shenandoah was under command of and was operated and navigated by and under the direction of Captain John McAvoy, as Master of said vessel, for the above named defendant.

That at and during the time hereinafter mentioned, the plaintiffs herein were engaged under and pursuant to an act of the Congress of the United States, approved March Third (3rd), 1899, entitled "An act making appropriation for sundry civil expenses of the Government for the fiscal year ending June Thirtieth (30th) 1900, and for other purposes", in constructing certain improvements to the Harbor of the Port of Two Harbors at Agate Bay on Lake Superior in the District of Minnesota, as authorized and directed by said Act of Congress; that said improvements so at said time under process of construction by the plaintiffs, consisted among other things in the construction of an extension to the Easterly Break Water at the entrance of said Harbor; that for a long time prior to the beginning of such improvements, there had existed and been maintained by the plaintiffs on the East side of said Harbor, a Break Water, seven hundred and fifty (750) feet in length, and said improvement so under

process of construction, was a continuation of said [olf] Break Water, Three hundred (300) feet in a Southerly direction, and at an angle of forty five (45) degrees to said old Break Water.

That at the time of the happening of the collision hereinafter set forth, said extension had been under process
15 of construction for many months, and due, full and complete notice of the projection and beginning of said extension and of the character and location thereof had been given to all mariners, ship owners, navigators and masters of vessels, owning and plying ships or vessels on the Great Lakes, and such notice had been given to the said Captain John McAvoy, the Master in charge of and navigating said Steamship Shenandoah, long before the time of the happening of said collision hereinafter set forth.

That from time to time at frequent intervals during the progress of the construction of said extension, a full and correct description of the character and location of the same was widely and thoroughly published and circulated by the plaintiffs, among mariners and owners and masters of vessels navigating on the Great Lakes, and a full and correct notice of the construction, location, character and description of said extension, had frequently and long before the happening of said collision been given to the above named defendants, and to the said Captain John McAvoy, Master of said Steamer Shenandoah.

That said extension to said Break Water consisted of six large cribs Eighteen and one half ($18\frac{1}{2}$) feet in depth below water level, twenty-four (24) feet wide and fifty (50) feet in length, ballasted with rock ballast, rip-rapped both on the Lake and Harbor side of the same and at the end thereof, and on the twenty-fourth (24th) day of July A. D. 1901, all six of said cribs were
16 in place, fully ballasted, with decking on the top of the ballast boxes complete, and rip-rapped all along the Harbor side and at the end and for a distance of two hundred feet along the outer or Lake side thereof, from the outer or Lakeward end of said extension; but the rip-rapping of the outer or Lake side of cribs Numbers One (1) and Two (2) (which were nearest the end of said old Break Water) had not been put in place or completed.

That a portion of the superstructure of said extension had been placed thereon, and [sais] extension protruded above the water level from one and a half to two feet all along its entire length, and at intervals of fifty feet along said extension a group of four posts of 12x12 timber protruded a distance of eight feet above the water level, and said extension had so protruded above the water for a long time prior to the said Twenty fourth (24th) day of July A. D. 1901.

That on the night of said Twenty fourth (24th.) day of July A. D. 1901, the plaintiffs caused said improvement and extension to be, and the same was brightly lighted by a powerful white light attached to a mast sixteen feet above the water level, at the outer or Lakeward end of said extension and by a powerful red light attached to a mast thirty feet above the water level at the inner or landward end of said extension; that said lights were visible for a great distance out at sea, and said extension was so lighted as to give ample notice and warning of its existence and location to vessels entering said Harbor at night.

17 That on the evening of the said Twenty fourth (24th.) day of July A. D. 1901, said Steamer Shenandoah, then and there owned by said defendant and then and there in charge of and navigated by said John McAvoy, the duly appointed, qualified and acting master thereof, attempted to enter said Harbor of Two Harbors, and while so doing, was then and there operated and navigated by the said master then in charge thereof with such gross negligence and carelessness, and said vessel was then and there navigated and permitted to be navigated by said master in such a gross and careless manner as to cause the same to run [unto] and collide with said Crib Number Two, of said extension, at a point about seventy five feet from the landward end of said extension, with such force and violence as to utterly destroy and demolish said Crib Number Two (2).

And these plaintiffs charge that said master was grossly negligent and careless in the navigation of said Steamer, and that said collision was caused solely by the negligent and careless manner in which said Steamer was navigated; that said Crib so destroyed and demolished thereby, was the property of and belonged to the plaintiffs, and that by reason of the negligence and carelessness of said defendant, hereinbefore set forth, the plaintiffs have been damaged in the full sum of Four thousand and twelve and 50/100 ($4012.50) Dollars, which is the cost to the plaintiffs of repairing and replacing said Crib.

That plaintiffs have demanded said sum of said defendant and said defendant has refused to pay the same or any part thereof.

18 Wherefore, the plaintiffs demand judgment against said defendant for the sum of Four thousand and twelve and 50/100 ($4012.50) Dollars, interest thereon since July Twenty fourth (24th.) 1901, and the costs and disbursements of this action.

FREDERICK N. DICKSON,
Assistant United States District Attorney and Attorney for Plaintiffs.

(Duly verified by attorney for plaintiff, March 1, 1902.)

Filed April 1st, 1902, Henry D. Lang, Clerk.

Answer.

(Heading of case.)

Now comes the defendant and for its answer to the complaint herein alleges:

1st. That it admits that it is a corporation duly organized and existing under the laws of the State of Minnesota and at the time stated in the complaint was the owner of the steam vessel "Shenandoah" of which John McAvoy was master.

2nd. That during the year 1900 the plaintiff had maintained a pier or breakwater extending in a Southerly direction from the Northerly side of Agate Bay some considerable dis-
19 tance across the entrance to said bay, which said bay and breakwater formed the harbor of Two Harbors.

That during the year 1900 and prior years the plaintiff maintained a red light on the outer end of said breakwater marking the extreme outer end thereof, and in its official guide and directions to mariners issued by plaintiff at the opening of navigation, 1901, the outer light for the Two Harbors breakwater is described as a red light, and no notice of change of the character of the outer light was ever given by plaintiff.

That at some time during the year 1901, and prior to the 24th day of July, 1901, the plaintiff had caused an extension of said breakwater or pier to be built in a Southerly direction about five hundred feet from its former terminus. That a considerable portion of the said extension was under water and not visible to a vessel approaching said harbor from the Lake. That said extension gradually extended in height from the portion so submerged, to the end of the old breakwater where the new extension was nearly or quite the height of the said old breakwater.

3rd. That plaintiff prior to July 24th, 1901, had given no public notice to mariners of the extension of said breakwater and no notice of the fact that the outer end of the breakwater was marked by a white light. That on the night of July 24th, 1901, plaintiff, or those under its employment and direction displayed a red light at the outer end of the old breakwater as had been done in prior years, and at the same time displayed a white light on a pole some twelve or fourteen feet above
20 the water at or near the outer end of the new extension to said pier, with nothing between said red and white lights to indicate the presence of the new extension.

4th. That during the night of July 24th, 1901, the Steamer Shenandoah was down bound from Duluth, laden with a cargo of iron ore, the weather at this time being boisterous with heavy wind and sea from the North East.

That at the time the Shenandoah was engaged to tow down the Lakes a loaded Barge which at the time was lying at the Port of Two Harbors. That to secure said Barge it became necessary for said Steamer to enter the Port of Two Harbors.

That said Steamer proceeded down to a point nearly abreast of the harbor entrance at Two Harbors, when the vessel was headed for the harbor entrance and slowly approached the same; wholly unaware that the breakwater had in any manner been extended, and relying upon the red light displayed, to mark the outer end of the breakwater as it had done for many years prior to the time in question and as directed by plaintiff's official sailing directions.

That the officers and crew of said vessel were at their several stations and a sharp lookout was kept. That the master and crew of said vessel, seeing the white light before referred to, supposed from its location and color that it was the light of a vessel at anchor or at a nearby dock, the light being of the character required to be displayed by a vessel at anchor, its apparent position being where vessels usually anchor.

21 That as said vessel approached the entrance to the harbor as indicated by the red light, breakers were discovered ahead and the vessel was backed full speed, but in spite of every effort on the part of the master and crew the vessel came into collision with said extension of the breakwater, and it was only by great exertion that the vessel escaped serious injury as a strong wind and heavy sea were prevailing at the time from the North East.

5th. The defendant says the master and crew of said vessel had no knowledge or information that the said harbor entrance had been and was obstructed by said breakwater extension. That they had not been into the harbor of Two Harbors for a number of years prior to that date. That no danger signals or proper lights or warnings were displayed to notify approaching vessels of the dangerous situation but that on the contrary the lights used, and their situation was such as to lure an approaching vessel onto the submerged pier.

6th. Defendant alleges that plaintiff was negligent in not giving public notice of the extension of said breakwater and not giving public notice that the outer end of the breakwater was marked at night by a white light. That it was negligent in maintaining a red light at the end of the old breakwater and at the same time a white light at the end of the new extension with nothing between them (a distance of about five hundred feet) to indicate the presence of an obstruction to navigation.

7th. Defendant denies every allegation, matter and
22 thing in said complaint contained not herein admitted or qualified.

Wherefore, defendant asks that plaintiff take nothing in this action and that it have judgment against plaintiff for its costs.

April 19th, 1902.

C. E. KREMER,
SEARLES & SPENCER,
Attorneys for defendant.

(Duly verified by G. A. Tomlinson Vice president of the Davidson Steamship Company, April 22nd, 1902.)

Filed April 22nd, 1902. Henry D. Lang, Clerk. By E. Catharine Neff, Deputy.

23 Reply.

(Heading of Case.)

Now come the plaintiffs and for reply to the answer of the defendant in the action above entitled, they deny each and every allegation, statement, matter and thing in said answer contained and every part thereof, as herein stated or otherwise save such thereof, as in their complaint herein admitted and alleged.

Wherefore they demand judgment as in their complaint is demanded.

FREDERICK N. DICKSON,
Assistant United States Attorney.

(Duly verified by F. N. Dickson, April 26th, 1902.)

Filed April 28th, 1902. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy.

24 United States Circuit Court,
District of Minnesota,
Fifth Division.

United States of America, Plaintiff,
v.
Davidson Steampship Company, Defendant.

This action came on for trial before Hon. Page Morris, U. S. District Judge, for the above named state and District at a general term of the United States Circuit Court for said District, on the 12th day of July A. D. 1904, at Duluth, Minnesota.

Mr. Charles C. Houpt U. S. District Attorney appeared for the plaintiff.

Messrs. Searle & Spencer and Mr. C. E. Kramer appeared for the defendant.

A jury is duly empaneled and sworn and the case on the part of the Government is opened to them by Mr. Houpt.

The case on the part of the defendant is also opened to the jury by Mr. Spencer.

It is agreed by and between respective counsel that the testimony of certain witnesses given on former trials of the case may be read in evidence on this trial, on behalf of the plain-
25 tiff or defendant, with the same force and effect as if the said witnesses were present and sworn on this trial; and it is further agreed by and between counsel herein that any and all objections made to any of the testimony given on former trials which may be read as evidence in the case now on trial may stand as objections made to the same testimony on this trial; and that where the ruling of the court on said objections is the same as that on the former trial the exception granted on the former trials shall stand and have the same force as if the exception had been taken to the evidence on the trial of the present case.

Counsel for plaintiff now reads in evidence the testimony of John McAvoy given on a former trial of this case, which is as follows:

John McAvoy, is called and sworn as a witness on the part of the plaintiff,

Mr. Houpt: I desire to call this witness as an adverse witness, under the statute of Minnesota.

Mr. Spencer: I desire to make the same objection that was raised before, and I suppose there will be the same ruling and exception.

The Court: Yes.

On the former trial said objection was raised as follows, on the offer to introduce the testimony of the witness as an adverse witness.

Mr. Kremer: We object to that.

* * * * * * * *

27 The Court: This decision reads as follows: "Error is also assigned to the ruling of the court in permitting the superintendent of the mill in which the accident occurred to be called for cross-examination under the statute section 5659, which provides that directors, officers, superintendent and managing agent of any corporation may be so called. The ruling is correct. The statute is a remedial one, and must be construed with reasonable liberality. To limit it by construction

to the general officers of the corporation, as claimed by the defendant would defeat the purpose of the statute; for as a rule, such general officers have no personal knowledge as to what occurs in the actual work of the corporation. The statute includes any officers, superintendent or agent having supervision of the work or act of the corporation involved in the case, whether his rank be that of a general officer or not." I always supposed that the captain of a vessel had considerable power and authority in representing his principal. I will overrule the objection.

Counsel for defendant excepts to the ruling.

The witness is then examined by Mr. Houpt, as follows:

Q. What is your full name? A. John McAvoy.
Q. Where do you live? A. Chicago.
Q. What is your profession or occupation? A. Mariner.
Q. How long have you been engaged in that line of work? A. A little over thirty years.

28 Q. In what capacity do you now work as a mariner? A. Mate of a steamer.
Q. Mate of a steamer? A. Yes, sir.
Q. For what individual or company? A. The Calvick Transportation Company.
Q. What were you engaged at in July, 1901? A. Master of the steamship Shenandoah.
Q. How long had you been master of the steamship Shenandoah? A. Two seasons.
Q. The steamer is owned by the defendant the Davidson S. S. Co. A. Yes, sir
Q. You became master then of this vessel in 1899? A. 1900.
Q. In what capacity had you served prior to that time? A. Master of steamers.
Q. From what ports did you sail as master of the steamer Shenandoah? A. Pretty much all the ports on the lake. From Duluth to Buffalo, and from Buffalo to Chicago.
Q. What was the size of the Shenandoah? A. About eighteen hundred tons gross.
Q. What was her length? A. A little over 300 feet.
Q. And what was her breadth? A. About 41 feet.
Q. Where were you on the 24th day of July, 1901? A. On Lake Superior.
Q. Where did you sail from to go to Two Harbors? A. From Superior Harbor.
Q. From Superior Harbor? A. Yes, sir.

29 Q. What time did you leave Superior Harbor? A. Somewhere round in the neighborhood of seven o'clock.
Q. Were you loaded? A. Yes, sir.

Q. What with? A. Iron ore.

Q. How far is it from Superior to Two Harbors? A. About twenty-six miles—twenty-seven miles.

Q. Twenty-six miles did you say? A. Yes, somewhere round that.

Q. What time did you arrive at Two Harbors? A. I arrived at the dock about 11:30.

Q. What was the state of the weather? A. It was blowing hard from the northeast.

Q. At Two Harbors, what bay were you intending to enter at Two Harbors? A. Agate Bay.

Q. Had you ever entered Agate Bay? A. Yes, sir.

Q. How often? A. Well, I had been in there several times; I couldn't say how often.

Q. Had you entered it at any time that year? A. No, sir, I had not.

Q. What was the direction of the wind that night? A. It was northeast.

Q. The night of the 24th of July? A. Northeast.

Q. In what direction were you sailing from Superior to Agate Bay? A. About northeast, half east. Northeast by east; somewhere along there.

Q. Northeast by east do you say? A. About northeast half east.

30 Q. What did you observe, if anything, with reference to lights in the bay? I will ask you this question. Do you know where the old break-water is? A. Yes sir. I have seen it several times when I was round there.

Q. In approaching the bay to enter the bay, what did you do? A. In what way.

Q. Did you make any observations before entering the bay, to see the manner in which you would enter it? A. Yes, sir.

Q. Well, what did you do? A. I done all I could. I looked to see, looked into the bay. Look ahead of you to know what is ahead of you; that is all.

Q. Did you see any lights? A. Yes, sir.

Q. What kind of lights did you see there? A. I see the red light of the break-water, and I see the light at the point. I saw the white light, and I seen a bright light out on the water as I supposed.

Q. Did you see a white light? A. Yes, sir.

Q. Out in the water? A. Yes, sir.

Q. Some distance within the red light? A. Yes, sir.

Q. How high was the white light above the water, as near as you could tell? A. I have been told it was 14 feet.

Q. How high did it appear to you that night? A. I thought it was about 18 to 20 feet.

Q. How far distant from the red light? A. I took it to be between 400 and 500 feet from the red light.

Q. Between 400 and 500 feet from the red light? A. Yes, sir.

31 Q. That was the color, a white light? A. Yes, sir.

Q. That could be seen how far out to sea? A. You could probably see it three or four miles; four miles that night.

Q. About four miles? A. Yes, sir.

Q. You could see that before you could see the red light? A. No, sir.

Q. Which did you observe first? A. I observed the red light first.

Q. You observed the red light first? A. Yes, sir.

Q. Is it a fact that you can observe a red light at sea farther than a white light? A. Some red lights you can; others you can not.

Q. Isn't it a fact that a white light can be seen farther at sea than a red light? A. Both of the same power?

Q. Yes; A. The white light can be seen farthest I think.

Q. What did you do, if anything, to inform yourself as to lights, signal lights that had been placed there, to know what work was being done by the government? A. At the time I didn't know as there was anything, any new work going on there.

Q. Will you state what, if anything, you had done to inform yourself that there was any new work in progress at the bay? A. I hadn't done anything as I know, except to look at the light house book, and so forth.

Q. You looked at the light house book? [—] That
32 was about all I had with me to look at for anything new.

Q. That was about all you did to inform yourself? A. Yes, sir.

Q. How long previously had it been since you had been in this bay? A. Something like a year, I believe.

Q. Can you give the exact time when you last entered it? A. No, sir I can not.

Q. Give it as near as you can? A. Some part of the season, the fore part of the season of 1900.

Q. The fore part of the season of 1900? A. Yes, sir.

Q. From the fore part of the season of 1900 up to this night of July 24th, you had made no inquiries, had made no attempt to inform yourself of the conditions of this bay, except as you state, you looked at the light house book. A. That is all. The light house book, that is all I had.

Q. You had that light house book with you that night, had you not? A. Yes, sir.

Q. That night of the 24th of July? A. Yes, sir.

Q. You knew of course, that the light house book you had with you, only informed you of the condition of the bay at the opening of navigation of that year, did you not? A. Yes, sir.

Q. You knew that? A. Yes, sir.

A certain chart is marked Government's Exhibit "A".

Q. I will show you Exhibit "A", being a chart of Agate Bay and Burlington Bay, and ask you if at that time you had ever seen this chart. A. No, sir, I had never seen that chart.

Q. You had never seen that chart? A. No, sir.

33 Q. Now, as a mariner on the Great Lakes, you know, do you not, captain, that charts of this character are issued by the Government, for the purpose of describing and showing the location of new government work going on at the various bays and harbors upon the Great Lakes? A. No, sir.

Q. You never learned of that fact? A. No, sir.

Q. Did you not know that charts or maps of this character are placed at the various ports in the hands of the engineers or government officers, and may be purchased by mariners upon the Great Lakes, at the various ports? A. No, sir, I did not.

Q. And in particular at Detroit? A. Yes, sir; at Detroit I knew they were.

Q. You knew they were on sale there? A. Yes, sir.

Q. And that they could be procured for the trifling sum of five cents? A. No, sir.

Q. You didn't know that? A. No, sir.

Q. Which, or where was your post office at that time, in 1901 your marine post office? A. At Detroit.

Q. That was where you ordinarily received your mail, was it? A. Yes, sir.

Two certain pamphlets are now marked Government Exhibits "B" and "C" respectively.

Q. I will show you Government Exhibits "B" and "C", and ask you whether you had ever at that time, July 24th, 1901, seen either of these Exhibits, or copies of them? A.

34 No, sir. I had not seen that one (Exhibit "B"); and to the best of my knowledge, I had not seen that one either (Exhibit "C").

Q. Neither Exhibit "B" nor "C"? A. No, sir.

Q. They are pamphlets entitled "Notice to Mariners" and issued by the government, for the purpose of acquainting sailors upon the Great Lakes with the changes in the harbors that occur from time to time, are they not, captain? A. I believe

Q. You have frequently received such notices, have you not? A. Yes, sir.

Q. It is a common thing, is it not? A. Yes, sir.

Q. The government makes a business of mailing them to the owners of vessels, or to master of vessels? A. Yes, sir.

Q. They can be procured, can they not, by the owners and masters of vessels at the government offices, can they not? A. Yes, sir, I suppose they can.

Q. If a master of a vessel receives these notices to mariners, as issued by the government from time to time, and acquaints himself with their contents, he would be familiar with all the changes that occur from time to time at the various ports upon the lakes, would he not? A. He would possibly.

Q. And the improvements, would he not? A. If he could keep track of them all and recollect them.

Q. And isn't it true that if he would possess himself
35 of one of these maps or charts, he would also be familiar with the improvements going on on the lakes, and with their location? A. Providing he would know anything about these charts being issued by the government.

Q. If he would know about their being issued? A. Yes, sir.

Q. If he knew that he could get them always? A. Yes, sir.

Q. Your vessel came in contact with the break-water that is described in the complaint in this action, did it not? A. Yes, sir.

Q. Did you see the break-water? A. No, sir, I did not.

Q. Did you see it before you collided with it? A. I seen what I supposed was smooth water breaking; and that is all I could tell about it. I couldn't tell what it was at the time.

Q. You saw the water breaking? A. Yes, sir. I saw breakers.

Q. You could see the water breaking over it? A. All I could see was water breaking over it. That was all.

Q. You knew that there was something there? A. Yes, sir. I knew there was something there.

Q. How far away were you from the breakwater when you first observed it? A. Possibly 200 feet.

Q. I wish you would just tell the Court and jury now, as you came within sight of the bay, how you managed your ship, with a view of entering the bay, on that night? A. On the night of the 24th of July?

Q. Yes. A. Well now, I kept hard away from the
36 harbor, and checked down. Coming in checked down I saw this light ahead; I saw this bright light, and supposed it was a schooner there at anchor, or a barge rather. I saw there was plenty of room between that light and the end of the breakwater for me; so I steered as near as I could about

midway between both lights. I supposed I was going in clear, until I see the water breaking down under her bows. Then I knew there was something wrong; so I rang and gave the bells to reverse the engines immediately.

Q. At what rate of speed did you run from Superior up to the bay? A. Well, there was a big sea on when I went out. We were not making more than nine miles an hour; and part of the time we wasn't making that.

Q. When you checked down, as you say, what rate of speed were you going then? A. About four miles.

Q. You were going about four miles an hour, were you? A. Yes, sir.

Q. When you first noticed the water breaking over this breakwater? A. Yes, sir.

Q. And the sea? A. Yes, sir.

Q. Then you were running against the wind, were you not? A. No, sir, I was running with the wind.

Q. You were running with the wind, were you? A. Yes, sir, with the wind. With the wind on our quarter.

Q. When you noticed the breakwater what did you do then? A. As I stated before, I signalled to back up; to reverse the engine.

Q. You signalled to reverse the engine? A. Yes, sir.

37 Q. In what distance could you ordinarily stop your boat when it was going at the rate of four miles an hour? A. Oh, a little over three hundred feet.

Q. A little over three hundred feet? A. Yes, sir, somewhere round three hundred or three hundred and fifty feet.

Q. At what rate of speed were you going, as near as you can estimate at the time you collided with the breakwater? A. Well, I don't think she would be going over a mile and a half or a mile and three quarters an hour.

Q. Did you examine that night to see what you had struck? A. No, sir, I did not.

Q. You did not? A. No, sir.

Q. Did you the next morning? A. No, sir, I did not.

Q. When did you first learn that you had come in contact with that breakwater? A. I learned of it after I went inside.

Q. When? A. That night.

Q. You learned it that night? A. Yes, sir.

Q. But not from your own observation then? A. I could see it, yes, sir.

Q. You could see it then? A. Yes, sir. I could see it from the harbor side.

Q. You could see it from the harbor side? A. From the inside, looking out.

Q. It was very plain to you then, was it not? A. Yes, sir.

Q. Calling your attention again to Exhibit "A", being a chart of Agate Bay, don't you know, as a matter of fact, that the government advertises in the various papers, where these
38 charts may be obtained, and what these charts refer to? A. Yes, sir. I have seen them advertised.

Q. You have seen them advertised? A. Yes, sir.

Q. You have seen advertisements of that kind? A. Yes, sir.

Q. And whenever a new chart is issued, by the government they always also advertise, so that mariners may know that fact? You know that, do you not? A. No, sir, I have never seen where they were advertised. I don't ever remember seeing them all advertised. I have seen some advertisements about these new charts coming out in colors; they are old charts painted over.

Q. You have seen advertisements, and the advertisements notified you that the charts could be obtained at the Government offices? A. I have always known where I could get them, if I had time to go and get them.

Q. Yes. That is, you know you could always get these government charts? A. I knew that I could get them at Detroit?

Q. When did you last have a chart of Agate Bay? A. I had one similar to that. All the difference was that the new extension isn't on it, and the shallow water is not colored. That is all the difference.

Q. When was that chart issued? What is the date of it? A. I think it was the same chart; the same chart, only not colored.

Q. The same chart, only not colored? A. Yes, sir.

39 Q. Did this chart show the extension of that breakwater? A. No, sir.

Q. Then it is not the same chart as this? A. Yes, sir, only this breakwater is not on it.

Q. You don't know the date of it? A. No, sir, I think they are [are] all the same survey.

Q. Where did you get that chart? A. Well, it was on the boat when I went on board her. It is there yet, I think.

Q. It was on board the boat when you went on board her? A. Yes, sir.

Q. That was the spring of 1900? A. Yes, sir.

Q. Did you have the chart with you that night? A. It was lying on the chart desk, on top of the pile.

Q. You didn't examine it, did you? A. No, sir, I did not.

Q. Now, captain is it your practice on entering a harbor to do so without knowing the condition of that harbor, as to changes that might have taken place there? A. Well, you

have got to enter every harbor without knowing the changes that are taking place.

Q. What is that? A. You have got to enter every harbor without knowing the changes that are taking place.

Q. When you go to enter all harbors? A. Yes, sir, when you go to enter all harbors.

Q. But, if you had these up-to-date maps, and these charts of the lights, issued in connection with these notices to mariners, similar to exhibits "B" and "C" you would be fully informed or advised as to any changes. A. As to govern-

40 ment work, yes, sir.

Q. Well, yes, I am speaking now about government work; and when I speak of changes I refer to government work. It is a fact within your knowledge, isn't it captain, that in all these harbors about the Great Lakes the government is continually at work making changes and making some improvements, is it not? A. Well, they are in a great many of them.

Q. They are building breakwaters and breakwater canals, or doing some work of that kind? A. In a great many of them; yes, sir.

Q. And a mariner, in order to know what is going on, can only learn it, can he not, either from personal inspection and perusal of these notices to mariners, and the charts that the government provides for that purpose. A. That is about all.

41 The testimony of Arthur E. Powell, given on the former trial was read by Mr. Houpt, as follows:

Direct Examination.

Q. Your name is Arthur E. Powell? A. Yes, sir.

Q. Where do you reside? A. Marquette, Michigan.

Q. What is your business? A. Contractor.

Q. How long have you been in the business? A. About four years.

Q. What is the nature of the contracts—the work which you do? A. Well, government pier work and railroad work.

Q. How long have you been in the business in the name of your firm? A. I have been with the firm four years.

Q. What is the name of the firm? A. Powell and Mitchell.

Q. During the summer 1900 what work were you engaged in, at that time? A. At Two Harbors, Minnesota, Agate Bay.

Q. What was the nature of the improvements you were engaged in at that time? A. Building and extending the sea pier.

Q. Go on and describe a little more fully to the jury the nature of the work, how it was extended, from where to where. A. We found there was an old pier there, I don't know the exact distance of it, we built an angle and ran out 300 feet to the southeast, I should judge.

Q. You mean to the southwest? A. Yes, sir, southwest.

Q. How high was this structure being built? A. It was supposed to be six feet at low water datum.

Q. State the manner of construction and the depth of the water. A. It was a rock foundation, that we put the
42 [crip] in. We built our cribs 20 feet high and a six foot superstructure on top of that.

Q. The jury may not understand about these cribs, can't you describe it briefly? A. Well, it is all timber work built and fastened together, and filled with stone and cribs built then and sunk.

Q. Filled with stone and then sunk in the water? A. Yes, sir, then the superstructure and then filled up.

Q. How large were these cribs that extended that 300 feet into the harbor? A. They were fifty and twenty four feet wide.

Q. Were you there the night of the 24th of July, 1901, when this accident occurred? A, Yes, sir.

Q. Where were you at that time? A. In bed.

Q. Did you see a light at the end of the old breakwater and on the new cribs, or rather the end of the new pier? A. I saw both lights between half past ten and a quarter to eleven, both lights burning.

Q. That was before the accident? A. Yes, sir.

Q. What was the character of the light at the end of the pier? A. It was a white light, one of the largest lights we could get for that purpose.

Q. How high was that light? A. Fourteen feet.

Q. What was the light on the old pier, a white light, or a red light? A. It was a red light.

Q. What was the character of the night if you remember the weather? A. Well, there was a little wind blowing in the afternoon before, that was the 24th, but we worked on
43 the pier until six o'clock. The next morning there was a little swell running but we went out, we couldn't work on the outside, but we went out to work on the inner side, on the timbers.

Q. What was the nature of the injury, the extent of the injury from the vessel running in the pier there? A. The crib was broken in two. The outer side was opened up about half way through the crib, and two of the adjoining cribs were knocked out of place.

Q. These cribs were each 20 feet long? A. Yes, sir.

Q. I will show you government's Exhibit "A", and ask you to point out this extension. A. Yes, sir.

Witness points out the extension on the plat Exhibit "A".

A Juror: What do you mean by your cribs?

Witness: The cribs you see, this crib is made like this (making a rough sketch on a piece of paper) there is one wall there, and another there. This is made of 12x12 timber, and across there, there is what we call cross ties, there are seven of these cross ties or cross timbers on the length of that crib.

Q. I will show you another plat or map. A. Yes, we built a kind of a box, built it and filled it with rock and stone, and sunk it down to that line; it says lower water datum. That is what we call the superstructure, all about here, that is filled with rock.

The Court: It forms part of the entire breakwater.

Witness: Part of the entire breakwater; yes, sir.

44 Q. These cribs are how long? A. 50 feet long.

Q. Then there would be five of them altogether? A. They are fifty feet this way, I would say, and twenty four feet that way, and twenty feet deep I think it was, I couldn't be positive, 12x12 timbers.

Q. Can you illustrate on that how this one crib was broken when this vessel ran into it? A. Yes, this is supposed to be seven cross-ties. It was right about there (indicating) they struck right in here.

Q. That was all filled with rock? A. Yes, sir, it was all filled with rock, the superstructure of it was in. There was three cords of timber on top of it. It struck it [is] here, and tore a big chunk out here, and let all the rock out in here like this; and it took this wall, just cracked it open like that, pushed it open like that. This crib that was over here, it displaced that crib way off like that (indicating).

A Juror: Then it took this crib away?

Witness: Yes, and then the timber was clean smashed so that it all had to be taken out, and all the rock came out after.

Q. How far from the end of the old breakwater, the west end of the old breakwater, did this vessel strike? A. About seventy-five feet.

Q. So there was about 225 feet of the new breakwater to the left of the vessel? A. Yes, sir.

Q. That it would have to go around before it could get into harbor? A. Yes, sir.

45 Q. How many improvements of this character have you been engaged in here, connected with and about the great lakes or upon Lake Superior? A. Four.

Q. Do you know what the usual light is in lighting these structures, which are used by contractors and by the government before these structures are completed? A. Yes, sir.

[A.] While in process of constructing? A. Yes, sir.

Mr. Kremer: I object to this as immaterial, incompetent, and irrelevant, as to what is the usual way of lighting them; the question is, what is the proper way of lighting them. If the light is regulated by law, then the light should be there. We contend that there is a legal light provided for that breakwater, and it does matter what they substitute for it, although they may have been acting in harmony with the usual rule.

The Court: You will have to take the evidence and deal with it after it is all in, the objection will be overruled.

Counsel for defendant excepts to the ruling.

Q. Can you state what is the usual light that is used for improvements of this kind, after they are completed? A. Yes, sir.

Q. What is it? A. White light.

Q. That was always customary as far as you know?

Counsel for defendant makes the same objection to the question as to the former one of the same nature.

The Court overrules the objection and counsel for defendant excepts to the ruling.

46 The Court: Of course, I am reserving the right to make a final ruling when the evidence is all in.

Mr. Kremer: I simply desire to save my exceptions.

The Court: This is proper.

Q. You saw Captain McAvoy the next day did you? A. Yes, sir, the next morning.

Q. Where and when? A. In the cabin on the steamship.

Q. Who was present at that time? A. Mr. Krey and Sam Wetton.

Q. Did you see the light there next morning before you had the conversation with Captain McAvoy? A. Yes, sir.

Q. What was the condition of the light upon the breakwater at that time, both lights, the white light and the red light? A. The red light was generally put out between six and seven o'clock in the morning, but the white light burned until pretty near noon that day.

Mr. Kremer: There is no dispute as to those lights being there.

Q. Was there anything said to Captain McAvoy at that time with regard to the accident, or the collision of the night before? A. Yes, sir.

Q. What reply did he make? A. Why, he said he was coming down the lake in his regular course to turn in there. He said he had the boat under perfect control and he didn't have instructions that the work was going on.

Q. Did you not replace this work Mr. Powell? A. Yes, sir.

Q. Can you state to the jury the manner in which it was replaced? A. We simply built a crib to replace the crib,
47 the government took out the broken parts, and we replaced the broken crib, that was all.

Q. You didn't remove the old crib then? A. No, sir.

Q. You didn't tear that out? A. No, sir, the government did that.

Q. You simply built a new crib. A. Yes, sir.

Q. Do you know who did take out the old crib? A. It was done with dredges here in the harbor; I don't know which one.

Q. Don't you know what the cost was of building the new crib? A. No, sir, I don't know anything about that part of it.

Q. You don't know anything about that? A. No, sir.

Q. You don't know what was paid for it? A. No, I do not.

Q. Who had charge of that part of it? A. Mr. Wetton, was doing a portion of it; who was there in charge of the building do you mean?

Q. No, the name of the contractor. A. It was done through the Marquette office.

Q. You don't know approximately what in your opinion it was worth to put in the new crib?

Objected to by counsel for defendant.

Q. What was it worth—you know that? A. I could tell if I sat down and figured it out.

Q. You don't know? A. No, I do not.

Cross-Examination

Read by Mr. Spencer:

48 Q. Are you a member of the firm of Powell & Mitchell? A. No, sir, I am not.

Q. Were you putting in these cribs, one of which was struck by this vessel? A. Yes, sir.

Q. Where were these cribs being built? A. Built at Two Harbors or Agate Bay.

Q. By whom? A. By Mr. Wetton.

Q. For whom? A. Powell & Mitchell.

Q. Powell & Mitchell got the contract for putting in the work? A. Yes, sir.

Q. Did they have the contract for putting the cribs in place? A. Yes, sir.

Q. And filling them with stone? A. Yes, sir.

Q. Do you know whether they were doing the work under a written contract? A. Yes, sir.

Q. Have you that written contract? A. Not with me, no.

Q. How long a breakwater did they have a contract for? A. There was 600 (300?) feet on the east pier, and I don't know how much on the west pier. They did some work on the west pier.

Q. Do you know whether they were to do all the work, and furnish the timber and stone and put the cribs in place? A. Yes, sir.

Q. Had you finished the work when this collision took place? A. No, sir.

Q. At that time the crib that was struck, was how many inches above the surface of the water when the lake was still?

A. I should judge about 18 inches.

49 Q. Eighteen inches? A. Yes, sir.

Q. And when there was a sea on the sea broke right over it? A. Yes, sir.

Q. So that in the night time there would be nothing much visible of that crib? A. Well, posts were stuck up right along. they stuck about five feet.

Q. The posts did? A. Yes, sir.

Q. What posts were these? A. Upright posts and crib work.

Q. How many of them in a crib? A. Four.

Q. And between the red light on the old breakwater and the white light on the end of the new breakwater, there were no other lights? A. No, sir, not along the work.

Q. Had the red light been moved any? A. Yes, sir.

Q. How far had it been moved? A. It had been moved, I don't know exactly; I should judge about thirty feet back on to the old work.

Q. Didn't Captain McAvoy state that he made the harbor by rounding the red light, as he supposed? A. Yes, sir.

Q. He said he came in there and saw the red light and supposed that was the place to go round, and he started to go round that? A. Yes, sir.

Q. And when he got within a certain distance of the pier he saw the breakers over the new work, and then stopped and backed his boat as fast as he could; isn't that what he said?

A. He said he saw the breakwater when he was about

50 200 feet from it.

Q. And then he said he stopped, and backed as fast as he could? A. No, sir.

Q. Do you know whether he said that or not? A. I don't know.

Q. What depth of water was there along there, where you were putting in the new work? A. It was about 20 or 21 feet on the embankment. Of course the water varies there. There is a high water mark and a low water mark; every day it is a little different.

Redirect Examination

Read by Mr. Houpt:

Q. I want to ask you one further question and that is with regard to this particular crib that was broken by the steamship "Shenandoah". Do you know whether or not that particular crib had been accepted and paid for by the Government? A. Yes, sir.

Q. Were you employed there during the whole process of the work, during that summer? A. On the east pier I was, yes, sir.

Q. Do you know from time to time whether different parts of the work were accepted by the Government? A. Yes, sir.

Q. What officer was there to inspect the work? A. Why, Mr. Krey was there and Mr. Sinclair, and another engineer. I forgot his name.

Q. Are you a member of the firm that was interested in the work? A. No, sir; I have no interest in the work.

Q. Were you employed by the firm? A. Yes, sir.

51 Q. In what capacity? A. Superintendent.

Q. You were the superintendent? A. Yes, sir.

Q. You say you know when the different portions of the work were accepted by the Government officers? A. Yes, sir, I did.

Objected to by counsel for defendant as leading.

Q. What was the condition of this crib at the time of the accident, as to whether it was accepted or not?

Objected to by counsel for defendant as immaterial, incompetent, and irrelevant. The question of accepting was one that probably appeared in some writing, and therefore oral testimony should not be admitted as to that.

The Court: (Judge Morris) The question may be answered.

A. The crib had been accepted.

Q. The crib had been accepted? A. Yes, sir.

Q. Do you know whether or not it had been paid for at that time? A. Yes, sir.

Q. I will ask you whether it had been paid for or not?

Objected to by counsel for defendant as immaterial, incompetent and irrelevant.

The Court overrules the objection and counsel for defendant excepts to the ruling.

Recross-Examination

Read by Mr. Spencer:

Q. You say the crib was not finished at this time? A. The crib was finished.

Q. Was the superstructure finished? A. No, sir.

52 Q. The works had not been completed? A. Not the whole of them, no, sir.

Q. How much work did you have to put on top of the crib before it was finished? A. The crib was finished, but the superstructure we had just about finished in that crib.

Q. Was there more filling to be put in there? A. No, sir, it was filled up to the timber we had in there; we couldn't put in any more filling until the timber was put up.

Q. Until it was filled it was not complete? A. Not the whole structure, no, sir.

Q. Do you mean to say that whatever you did the Government accepted it at any time? A. It accepted the crib after a certain time after they had been put in place and sunk.

Q. That was under the terms of your contract? A. I don't know. I know they did it.

Q. How did you know it was accepted? A. From being in the office and being acquainted with the business.

Q. Who told you it was accepted? A. Mr. Powell.

Q. That is the only information you had? A. Yes, sir.

Mr. Smith: I move to strike out all the evidence of this witness as hearsay.

The Court: According to this witness many of the facts he has given in evidence are from information which he received from Mr. Powell, and that is hearsay.

Witness: No, sir, I have got a letter.

The Court: A letter from whom?

53 Witness: From Mr. Powell.

The Court: The motion to strike the evidence upon this matter is granted.

Counsel for plaintiff excepts to the ruling.

The testimony of Samuel Wetton, given upon the former trial was read by Mr. Houpt as follows:

Direct Examination

By Mr. Smith.

Q. Your name is Samuel Wetton? A. Yes, sir.

Q. Where do you live? A. I live at Hinckley, principally; that is my home there.

Q. What is your business? A. I am a carpenter by trade. I have been following breakwater timber work, it is a kind of timber construction.

Q. For how long? A. Well I have been with Powell and Mitchell these five summers continually; and I have been off and on at the breakwater business and on bridges and other timber [strustures] for the last 16 years.

Q. Were you engaged in the work of improvement of the East breakwater entrance to Agate Bay during the sum-
54 mer of 1901? A. Yes, sir.

Q. How long had you been employed there at the time of the collision with the Shenandoah? A. I came there and started that work in 1900, about the 28th of July.

Q. That is when the work was commenced? A. Yes, sir.

Q. 1900? A. Yes, sir 1900.

Q. How long did you work there in 1900? A. I put in 150 feet on the west pier and completed that.

Q. When was the work started on this 300 foot extension, on the east pier? A. We started, well, we started to build the cribs for the east side, the same summer, that same fall. We didn't sink any in place, but we built four that fall, and left them there over the winter.

Q. Where upon the shore? A. Right alongside No. 1 ore dock.

Q. Alongside No. 1 ore dock? A. Yes, sir, along side No. 1 ore dock.

Q. When was the work actually started in, southwest of the old or east pier? A. The first crib sunk?

Q. Yes. A. It was some time in June.

Q. 1901? A. 1901.

Q. Do you know whether there had been any stone work going on there before that time? A. Yes, sir.

Q. For how long? A. I don't know for how long it had been going along. Mr. Osborn had the contract of putting the embankment in there when I first got there.

55 Q. That is the foundation for the crib work, is it? A. Yes, sir.

Q. That was when you were working there that he put that in? A. He was putting it in but there was none of it completed at the time I started to work there.

Q. How many cribs were in there at the time of the collision July 24th? A. Six 50 foot cribs on the east side. One crib

was 60 feet on one side and 50 feet on the other side. It was an angle crib.

Q. Where were you on the night of the collision? A. I was a little bit north at the end of the east breakwater.

Q. Do you remember the character of the night? A. Well, not very distinctly, I remember the day before; but I didn't pay any attention about the night.

Q. How long were you working the day before there? A. We worked until six o'clock.

Q. Were you on this crib working there? A. No, sir, not at the place where this was, where the collision took place, where the vessel struck, but on the angle a little distance further in; right at the side of the cribs.

Q. What was the character of the seas at that time? A. There was a little roll but not to say a big sea.

Q. Nothing to prevent your working? A. No, sir, nothing to prevent us working. It would prevent us under water, or on a level with the water, but we were working above water, on a level with the water, we were above the water so it did not prevent us working at all.

56 Q. Did you see the light there that night? A. Yes, sir.

Q. And the next morning? A. Yes, sir.

Q. What time the next morning? A. About half past six.

Q. What was the condition of the white light out at the end of the new breakwater? A. It was burning in good shape, a good bright white light.

Q. Did you examine the extent of the injury to the crib? A. Yes, sir.

Q. Do you remember the number of the crib that was injured? A. Crib No. 2 on the east side.

Q. The second one from the old breakwater? A. Yes, sir, that is right.

Q. Were you present at a conversation held with Captain McAvoy on board his vessel the next morning? A. Yes, sir.

Q. On board the Shenandoah? A. Yes, sir.

Q. Who was there at the time? A. Mr. Powell and Mr. Krey and also another gentleman, I don't know his name, he was there at that time.

Q. What did Captain McAvoy say at that time with regard to the cause of the accident or collision? [Q.] Mr. Krey asked him if he ran into the breakwater, and he said he had. Mr. Krey asked him if he had any excuse to give for running into it, and he said no, he hadn't any other excuse than he didn't know the work was there.

Q. How many different improvements and different works upon the lake have you been engaged in the last 10 or 15 years? A. I don't know, I could count them up though.

57 Q. About how many? A. Twelve to fourteen different ones.

Q. Do you know what the character of the light was that is used as a warning or danger signal upon these works you have been engaged in? A. Yes, sir.

Objected [—] by counsel for defendant as immaterial, incompetent and irrelevant.

The Court overrules the objection, and counsel for defendant excepts to the ruling.

Q. You may state what it was? A. When I stated 12 or 14 I didn't mean government jobs.

Q. You mean Government jobs? A. I think I was on about nine government jobs, may be ten would be right. I have not always had charge of these works, I have worked on them.

Q. Well, what is the nature of the light?

Objected to by counsel for defendant as immaterial, incompetent, and irrelevant.

The Court overrules the objection and counsel for defendant excepts to the ruling.

A. It has always been a clear light.

Q. It has always been a clear light? A. It has always been a clear light, yes, sir.

Cross-Examination

Read by Mr. Spencer.

Q. Whom were you working for at that time on these cribs at Agate Bay? A. Working for Powell and Mitchell.

58 Q. The first work that was done was the building of the cribs? A. Yes, sir, the first work that was done was to get ready and get the timber in shape, etc. and then we started to build the cribs after a few days.

Q. The cribs were built near the shore I suppose? A. No, sir, they were built at the breakwater, along the old breakwater.

Q. Behind it? A. Yes, sir, on the harbor side.

Q. On the land side? A. Yes, sir, on the harbor side.

Q. Inside? A. Yes, sir, inside.

Q. After you did this building of the cribs, then you would tow them out to the place where they were to be sunk and sink them? A. Yes, sir.

Q. You say the first one was sunk in June? A. Yes, sir.

Q. What time in June? A. I don't remember exactly.

Q. The crib you say was 50 feet on the outside, and 60 feet on the inside? A. Yes, sir.

Q. Making an allowance for the elbow? A. 10 feet for the jog.

Q. What was the next crib sunk? A. Well, the crib next sunk was only a little while after that.

Q. What part of July was it sunk in? A. I don't think it was in July. I think the two cribs were sunk in June or close to the first of July.

Q. That was the crib that was run into? A. Yes, sir.

Q. And the others were sunk at what time? A. Well, they were sunk possibly two weeks or ten days later, there was about two weeks difference between the cribs.

59 Q. Hadn't they been built before you sunk the first one? A. No, sir, we were building at the time we sunk the first one, building the last two.

Q. Then this collision occurring on the 24th of July, when did you say that these cribs were all put in within thirty days prior to that time? A. Yes; no, not within that time. They were not all put in within thirty days, I think the last crib was sunk on that side about the 10th of July.

Q. Then they had all been put in there ten days prior to this time, prior to the time of the accident? A. Yes, sir.

Q. How high was the second crib above the water at the time of the collision with the crib? A. I wish to correct that statement with regard to the time. The first crib was sunk in May. I am mistaken just one month. It was May instead of June.

Q. The next one was not sunk until June? A. The next one was sunk about the last of May or the first of June.

Q. How high did you say it was above the water when it was run into? A. The crib?

Q. Yes. A. Well, where it was connected with the old work it was, I think, four feet. That is four feet above datum. It would be about 3 ft. 6 above the water at that time.

Q. That was the first crib? A. That was the first end of the crib.

60 Q. How high was it above water when it was run into? A. On the harbor side it was between 16 and 18 above water.

Q. And on the lake side? A. And on the lake side it was just level with the water. With the exception of two posts that came up probably a foot and a half above the water.

Q. On the lake side you say the posts stuck up some, but it was just level with the water? A. Yes, sir.

Q. And on the other side there was a foot and a half of water? A. Yes, sir, about a foot and a half of water, but in addition to that there was two posts.

Q. Two posts? A. Yes, sir.

Q. Standing where? A. Within six feet of the outside of the harbor.

Q. How high were they? A. About a foot and a half above the water.

Q. Two posts? A. Yes, sir.

Q. A foot and a half above the water? A. Yes, sir.

Q. They were back however from the lake side? A. Yes. sir.

Q. How far back? A. About six feet.

Q. How high was the crib above the water that was further to the east of the crib that was run into? A. The next crib. these cribs and half of the fourth were the same height, in just the same condition.

Mr. Purdy: That is to the west?

Witness: Yes, sir, to the west. East of that it was raised. in eighteen feet it raised one foot; then about eight feet
61 further it raised another foot, as the timbers, those that were eastward of this crib, were different.

Q. Were they above the water? A. Those are the ones I mentioned now.

Q. The next one to the one that was struck, what was the height of that? A. The west end of it was just the same height as the crib that was struck.

Q. That is on a level with the water? A. Yes, sir, on a level with the water and then in eight feet it raised one foot.

Q. Which way did it rise? A. East from west and it was struck, or rather northeast from west it was struck.

Q. Was the outer row lower or higher than the one that was struck? A. It was lower.

Q. How much lower? A. It was just level with the one that was struck, the outer end was.

Q. You had these cribs that were just the same as the one that was struck? A. Yes, sir.

Q. Where was the second crib, was it level with the water? A. Yes, sir.

Q. How high was the third above the water? A. It was just the same.

Q. Now give the fourth one? A. It was just the same to the center of the crib. Then it went a foot lower; then it went under the water a foot.

Q. The fourth of the cribs was that under water?
62 A. About a foot under water.

Q. The extreme end of the fourth was two feet under water? A. No, sir, one foot.

Q. The fifth was how much under water? A. One foot.

Q. And the sixth was how much under water? A. One foot.

Q. So that the first crib was the only one that was above the water? A. Yes, sir, the first three cribs were above water. Why it began below the water.

Q. The superstructure began below the water? A. Yes, sir.

Q. Then the superstructure is a substructure? A. The superstructure is the top course on top.

Q. And the top course is under water? A. Yes, sir.

Q. Then the superstructure is the substructure? A. We don't call it that.

Q. The fact is that part of the superstructure is below water? A. It is part of the superstructure that is below water; but the substructure we generally call the lowest course in the crib.

Q. There was then no crib sunk on that new work until in May sometime? A. No, sir.

Redirect Examination

Read by Mr. Houpt:

Q. Counsel has inquired about these different cribs, six of them I believe? A. Yes, sir.

Q. He has been inquiring about the lake front, these cribs I understand are 24 feet wide and 50 feet long? A. Yes, sir.

Q. So that there was a kind of a row running out
63 there? A. Yes, sir.

Q. 300 feet long by 24 feet wide? A. Yes sir.

Q. Now on the night of the accident or the day before the accident how did these appear to show up to any one coming up there in a boat? How did the bay side appear just 24 feet beyond the lake front? A. In what respect, with regard to seeing it?

Q. Yes, with regard to what you could see. A. It would be pretty hard to see anything of it if it was still, but if there was the least little bit of a sea it could be very easily seen.

Q. How high was it? A. It was about—I think the first three cribs and part of the fourth crib were about eighteen inches above the water on the harbor side.

Q. On the harbor side? A. Yes, sir.

Q. Then you would have no difficulty in seeing that 18 inches? A. No, sir.

Mr. Kremer: I object to any testimony as to what the difficulty would be. I do not think that is competent.

The Court: The proper way is to show the size and height and so forth of it, because you are asking this witness what some one else could see.

Q. What was this projection or this structure that was above the water 14 inches on the bay side? A. One 12x12 and part of another.

Q. It was part of another? A. Yes, sir, two or three inches of the next one below that.

64 Q. It was running along the entire length? A. It was running along a little over four cribs, yes, sir.

Q. That is how far? A. That is probably 110 or 112 feet. Four cribs would be 200 feet, I mean 210 or 212 feet.

Q. 210 or 212 feet? A. Yes, sir.

Q. Was there anything else on the harbor side besides that, that appeared to any one approaching on the water? A. Yes, sir, two posts in each crib.

Q. Two posts in each crib? A. Yes, sir.

Q. Describe these posts, how high these posts stood up? A. They were 12″x12″ posts that stood up about 5 feet above datum, about 4 ft. 2 inches above water, 4 ft. 3 inches, probably.

Q. How many of these posts were there from the red light to the white light that stood up that height above the water? A. From the red light?

Q. Yes. A. There were six.

Q. Six. A. 12 posts, six in each crib, I mean 2 in each crib; six cribs and twelve posts. Twelve posts on the harbor side and twelve on the lake side, or eleven on the lake side.

Q. Eleven on the lake side? A. Yes, sir.

Q. So there were posts standing up on the lake side also? A. Yes, sir, but not so high.

Q. How high were they? A. About a foot and a half.

Q. A foot and a half? A. Yes, sir.

65 The testimony of John Krey given on the former trial was read by Mr. Houpt as follows:

Direct Examination,

Mr. Smith:

Q. Your name is John Krey? A. Yes, sir.

Q. What is your business Mr. Krey? A. Civil Engineer.

Q. What position did you occupy during the summer of 1901? A. I was assistant engineer of the United States.

Q. How long had you been assistant engineer of the United States? A. Very nearly seven years, I think.

Q. Connected with the office here in Duluth? A. Yes, sir.

Q. What were your duties as assistant engineer? A. I was in immediate charge of the harbor works.

Q. You were in immediate charge of the harbor works at Lake Superior? A. No sir, at that immediate place.

Q. Where was that? A. At the place that has been mentioned, Agate Bay.

Q. Under Captain Gaillard? A. Yes, sir.

Q. You had been in charge of that work all summer, had you not? A. Yes, sir.

Q. Where were you at the time of the collision? A. I was in my bed.

Q. When did you first learn of the accident? A. I learned about it the first thing in the morning, when I came down to breakfast.

Q. What crib was injured? A The second crib.

66 Q. Will you tell the jury the nature of the injury? A. The boat ran into the second crib from the lake side, penetrated into it, breaking the timber, the outside timber, of the wall, and pushed the rock filling out of the crib bodily forwards, so that the timbers of the harbor wall were also split down, probably 8 or 10 feet below the water line.

Q. Did you see how far the vessel had gone into the crib? A. Between 6 and 8 feet.

Q. You saw Captain McAvoy the next day? A. I saw Captain McAvoy the next morning.

Q. What conversation did you have with him about the cause of the accident? A. Well, sir, I boarded his vessel after I had ascertained to my own satisfaction that his boat had done the damage; I entered his cabin with two witnesses I took along with me, Mr. Wetton and Mr. Powell. I simply said "Good day, Captain, I believe you ran into the breakwater last night", and he said "Yes, I did." I asked him if he had any excuse to offer, and he said no, he had none. The only excuse he had to offer was he was not aware of the improvement. He said it was blowing pretty fresh from the Northeast and he mistook the white light. He said he saw the white light and mistook it for the light of a vessel dragging her anchor. He said he did, that is all I said.

Q. You were the assistant engineer? A. Yes, sir.

Q. What was your duty with regard to these cribs when they were completed. A. Well I superintended them.

67 Q. How long have you been engaged in superintending or interested in the improvements and Government works upon Lake Superior, or upon the great lakes, the northern lakes? A. For six years.

Q. During that time do you know what kind of lights the government officers or the contractors, I mean government officers, put out, as signals for mariners upon those works that are in process of construction? A. Yes, sir.

Q. What kind of a light do they put out?

Mr. Kremer: I object to the question for the same reason given before and as immaterial, incompetent and irrelevant.

The Court overrules the objection and counsel for defendant excepts to the ruling.

Q. What kind of lights? A. White lights.

Q. Did you ever see in the whole course of your work any other light than a white light upon Government work in the process of construction upon the great lakes?

Mr. Kremer: I object to the question for the same reason given before and as immaterial, incompetent and irrelevant.

The court overrules the objection and counsel for defendant excepts to the ruling.

A. No, sir, I don't remember.

Q. You don't remember you ever had? A. No.

68 Cross-Examination

Read by Mr. Spencer:

Q. The red light from the old place was moved back from the place where it had been placed? A. Yes, sir.

Q. Do you know what distance? A. It was between 30 and 35 feet.

Q. When was that old light moved back? A. I don't remember the exact time. It was sometime in June.

Q. Some time in June? A. Yes, sir.

Q. Do you remember now when the first crib was placed there? A. Yes, sir.

Q. When was that? A. On the 15th of May.

Q. And the second one? A. I couldn't tell you the exact date.

Q. Have you any recollection of it? A. I don't remember whether it was the end of May or the first part of June, the second one.

Q. And from time to time on your estimate the Government made payment on that work? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. But the final payment was not made until the contract was all completed? A. That is correct.

Q. Who put out the light out there? A. The contractor's men.

Q. It was no part of your work to do that? A. Oh, no.

Q. You were employed by what department of the Government? A. By the Engineer's department of the United States army.

Q. Are you a part of the United States Army? A. No, sir.

Q. And who elected to furnish the light that was to

69 be put up there? A. The contractors.

Q. Who furnished the appliance to which it was hung? A. The contractors.

Q. Did the United States have anything to do with that? A. Only instructed me to see it was put there.

Q. Did you report to the Light House board the moving of the red light? A. I reported the moving of the red light, of the necessity of having it moved to Captain Gaillard.

Q. Of the Army? A. Yes, sir, of the United States Army, and he took the necessary steps to report it to the Department.

Q. Confine yourself to what you know personally. A. I do know personally, they couldn't move the light without the permission of the Lighthouse Board, or Light House department.

Q. Who directed you to move the light? A. Captain Gaillard.

Q. Captain Gaillard? A. Yes, sir.

Q. The second one? A. Yes, sir.

Q. These cribs when they were put in place were filled with loose stones? A. Yes, sir.

Q. When this vessel penetrated the crib did it cut through the outer timbers on the lake side? A. Yes, sir.

Q. Do you know how wide the breach was? A. Let me see, it was between seven and ten feet somewhere in that neighborhood.

Q. Were the timbers driven in? A. No, sir, they were bodily broken, broken off bodily; they were afloat and the sea washed them into the crib itself.

Q. And the stones rolled out through the opening? A. Some of them did, and others were bulged out on the harbor wall.

70 Q. Some of them were bulged out into the harbor? A. Yes, sir, and some of them rolled out.

Q. Did you personally have any direction from the Lighthouse Board? A. Yes, sir, I had a letter from the Lighthouse Engineer which was written to captain Gaillard, a copy of it was forwarded to me.

Q. A copy of the letter? A. Yes, sir.

Q. Did you see the original? A. No, sir.

Q. Did you report the white light out there? A. Yes, sir.

Q. To your immediate superior? A. Yes, sir.

Q. Did you have anything to do personally with issuing the circular to mariners? A. No, sir.

Q. Or announcing the changes of lights? A. No, sir.

Q. Who had the contract for putting on the superstructure there? A. Why the substructure and the cribs and the superstructure were included or embodied in one contract, and Powell and Mitchell of Marquette had the contract.

Q. From time to time you made estimates, and the Government made partial payments on that work? A. Yes, sir.

Q. Did you report the accident to your superior officer? A. Immediately.

Q. Under whose supervision were the repairs made to this pier? A. I don't know, I don't know personally.

Q. You have no personal knowledge of that? A. No, sir, they were under the supervision of Captain Gaillard.

Q. Who made the repairs of replacing the crib, or the repair to the crib itself? A. I can't say I know. I heard of it.

71 Q. You simply heard of it? A. Yes, sir.

The testimony of Frank Heinrich, given on the former trial was read by Mr. Houpt as follows:

Direct Examination.

Mr. Smith:

Q. What is your name? A. Frank Heinrich.

Q. You live in the city of Duluth? A. Yes, sir.

Q. How long have you lived here? A. Since the spring of 1898.

Q. What has been your business here since that time? A. I have been nautical expert for the Navy Department.

Q. In the employ of the United States Government? A. Yes, sir.

Q. What are your duties as nautical expert of the Navy Dept.? A. I have charge of the United States hydrographic office in this city.

Q. Where is that located? A. In the Torrey building, 1001, Torrey Building.

Q. I will ask you what is Government Exhibit "B", notice to Mariners, published weekly at the [hrdrographical] office, July 29th, 1899. I ask you, if you have ever seen that bulletin or that notice before, or a copy of it? A. Yes, sir.

Q. Are these bulletins or notices sent to your office from Washington? A. Yes, sir.

Q. About how many do you receive weekly? A. Why, we receive now 550.

Q. How many did you receive during 1899 at that time? A. About 300.

72 Q. What did you do with those copies that you received of that bulletin, No. 30? A. We mailed them to masters in our district, the masters of steamships and sailing vessels.

Q. What do you mean by the masters of steamships and sailing vessels in your district? A. Those hailing from Duluth.

Q. Sailing from Duluth? A. Hailing from Duluth, and some others besides, any one that makes application through the office here had a right to receive these notices to mariners.

Q. Do you know whether Captain John McAvoy of the steamship Shenandoah was on the list at that time? A. Yes, sir.

Q. Do you know whether you mailed a bulletin or a copy of a bulletin to Captain John McAvoy? A. Yes, sir.

Mr. Kremer: I object, I have not had an opportunity to see whether this was before or after the accident.

Mr. Purdy: It was in 1899.

Q. In 1899, how often during that year did you receive these notices and bulletins of that character, every week? A. Every week, yes, sir.

Mr. Kremer: I think we should first know what this is all about; it may be immaterial. It seems to me the proper way is to get it in evidence.

Mr. Purdy: I will put it in evidence as soon as I lay a foundation.

Mr. Kremer: But you have laid a foundation now, and you are examining him as to the distribution.

The Court: Perhaps if you offer the bulletin after the witness has recognized it; you may submit it to the
73 counsel on the other side and see if he wishes to make objection to it.

Mr. Purdy: I shall do so as soon as I have laid foundation for it.

The Court: I think you had better do so before you offer it in evidence. Continue your examination.

Mr. Kremer: I want to put in an objection that they are not authenticated, and until they are brought home to the defendant, or to Captain McAvoy, they should not be admitted.

The Court: It may be admitted in evidence.

Mr. Kremer: I object to it for the reason given heretofore.

The Court: Yes.

The Court overrules the objection, and counsel for defendant excepts to the ruling.

(Mr. Smith refers the Court and Jury to page 25 of Exhibit "B").

Q. I show you Government Exhibit "C", and ask you whether you received that bulletin during the year 1900? A. Yes, sir.

Q. State whether you mailed a copy of that to Captain McAvoy of the steamship Shenandoah? A. Yes, sir.

Q. Where? A. At Detroit, Michigan, care of Marine post office.

Q. How was this mailed, was postage put on it or a frank? A. Official stamp.

Q. An official Government stamp? A. Yes, sir.

Q. Is it carried through the mails? A. Yes, sir.

74 Exhibit "C" is now offered in evidence by counsel for plaintiff.

Counsel for defendant makes the same objection as he made heretofore to the introduction of this Exhibit.

The Court overrules the objection, and counsel for defendant excepts to the ruling.

Q. Was this notice that you sent to Captain McAvoy at that time this notice, or any other notice sent to him during this year or any other, ever returned to you? A. Not from Captain McAvoy. Sometimes we did get a notice on account of the nature of the penalty stamp we had to address the office.

Q. I am asking you about Captain McAvoy's notice, his was never returned? A. No, sir.

Q. But you did get some returned sometimes? A. Yes, sir.

Mr. Houpt: I will waive reading Exhibit "C".

Cross-Examination.

Read by Mr. Smith:

Q. How do you know that you sent this to Captain McAvoy? A. From our mailing list. Captain McAvoy's name and the steamer he was master of is on our mailing list.

Q. Is there anything that refreshes your memory or have you a record of it, is there anything when you sent this indicating to the post office department at Detroit that that notice would be returned to you? A. Yes, there is a penalty

75 stamp. There is the address and the penalty stamp.

Q. Does anything on that notice say that if it is not called for it will be returned to this office? A. No, sir.

Q. Then there is nothing to prevent the document if not delivered, from being lost or destroyed? A. Nothing.

Q. Nothing? A. No, sir.

Q. You don't know whether Captain McAvoy received this or not? A. Indeed I do not.

Q. In this office is it your duty to take care of all kinds of notices to mariners that are issued by the various departments at Washington, and see that they are distributed? A. No, sir, only those of the United States Hydrographic office.

Q. What do they distribute? A. Notices to mariners and new improvements, and change of lights and buoys, or anything of interest and utility to navigation.

Q. Does your office distribute this circular marked Exhibit "1"? A. We have them for distribution when called for.

Q. When called for? A. Yes, sir.

Q. That book is issued annually? A. Yes, sir.

Q. Do they between times issue circulars with reference to lights and changes in lights? A. Notices to mariners, they do.

Q. Did you in 1901, receive any circulars, or distribute any circulars prior to July 24th, relating to a change of lights at Agate Bay? A. No.

Q. Did you have personally knowledge of a change of light there, namely that the red light on the old pier was supplemented by a white light at the end of the new pier? A.
76 No, sir, not at that time.

Q. You knew it after this accident occurred? A. Yes, sir.

Q. It is, or is it a part of your duty as having charge of the Hydrographical office here to report such changes to the Government? A. Immediately on their becoming known.

Q. What is that? A. Immediately on their becoming known. When they become known to us.

Q. Where do you get your notice? Do you get that information yourself, or is there a department of the Government that notifies you? A. The masters themselves are generally the greatest contributors of that knowledge, and the Lighthouse Board also notifies us of changes.

Q. Did you get any notice of any such change of the description I have indicated, that the red light at Agate Bay was supplemented by a white light, from any source?

Mr. Purdy: I object to the question, because the red light has not been supplemented by the white light.

Mr. Kremer: But the red light was there and the white light was there. I simply made the statement that they were there.

The Court: I think there is no difficulty about the question.

Witness: What is the question.

Q. Did you get any notice of any such change of the description I have indicated, that the red light at Agate Bay was supplemented by a white light from any source? A. I read the newspaper account, that was the first. I was in our
77 office and read the newspaper, the newspaper was the first I knew of the change.

Q. When was that with reference to this accident? A. On the 25th of July. It was the Duluth Evening News.

Q. That was the 25th of July? A. Yes, sir, the 25th of July.

Q. Did it recite the accident? A. Yes, sir.
Q. That was the first notice you had that a white light had been used at the end of the pier? A. Yes, sir.
Q. What did you do, was a bulletin issued?

Objected to by counsel for plaintiff.
Mr. Kremer: Well, I will withdraw the question.

Q. Have you had any experience as a mariner? A. I have been sailing since 1867 until I went to work for the Government.
Q. What does a red light at sea indicate? A. A red light at sea?

Mr. Purdy: I object to the question as immaterial, incompetent and irrelevant, and as calling for the conclusion of the witness, and as improper cross-examination; and further for the reason that it contemplates a state of facts that is not under consideration in this case.
The Court overrules the objection, and plaintiff excepts to the ruling.

A. A red light on the water means the port light of a vessel under weigh.
Q. Under weigh? A. Yes, sir.

Mr. Purdy: I object to the question for the reason
78 that the witness says that a red light upon the water, upon a vessel, means a ship under weigh. If it is a red light it does not need any further explanation.
The Court: The objection will be overruled.
Mr. Houpt: I would like an exception to that.

Q. What do you mean by a vessel under weigh? A. A ship in motion.
Q. So in the case of steamers plying in Agate Bay when the ship is in motion would it put up any other signal, and if so, what? A. [It if it] a steamer, it has a masthead light.
Q. What kind of a light is that? A. A bright white light visible all round the horizon.
Q. Do you know of any time or place that a red light is used on a ship for any other purpose? A. No.
Q. What is a white light used for on a ship at sea? A. For a masthead light, and the stern lights of a steamer, range lights.
Q. What else? A. An anchor light.
Q. An anchor light? A. Yes, sir.
Q. Is a white light, when alone, ever used for anything else than an anchor light?

Objected to by counsel for plaintiff, as immaterial, and irrelevant, and as not proper cross-examination, because the matter had not been gone into on examination in chief.

The Court: Objection is overruled.

A. I would like to have the question repeated.

Q. Is a white light when alone, ever used for anything else than an anchor light? A. No.

79 Q. A mariner approaching a harbor, and seeing a single white light in a bay, would, under the rules of lights, unless other wise informed, take it for what, as a signal for what?

The Court: Would not the better phrase be, under the rules of navigation?

Mr. Kremer: Under the rules of navigation, what would it indicate? A. Well, it would indicate first, a ship at anchor, and second it might indicate any light, as a house on the shore.

Q. I mean on the water only. A. A ship at anchor.

Q. Would it indicate anything else to a mariner? A. No.

Q. If the lighthouse had prescribed a red light to mark the end of the breakwater at Agate Bay, what do you say as to the propriety of using a white light to mark the extension of that breakwater?

Mr. Purdy: I object to it as immaterial, incompetent and irrelevant, and as calling for the conclusion of the witness, and as not proper cross-examination.

The Court: I think that is a question for the jury. You may show the facts and what significance the different colored lights have, and then it is a question for the jury to settle whether it is a proper or improper use of a light of that kind. Perhaps this witness may be sufficiently qualified to speak as an expert; if you get on the line of expert testimony that is another matter. I think it is a question for the jury, but he can give an explanation of the working and the significance of this light.

80 Mr. Kremer: Of course I am asking it of him as an expert, that is the only way I can consider it competent. But as an expert mariner familiar with the use of lights, whether in that calling which is somewhat different from the ordinary calling, whether that would be a proper or an improper use of that light is the question I want to ask the witness. It seems to me it is only as an expert that I can ask the question.

The Court: That may be involved with a variety of other considerations. Supposing the Government for any reason uses a light that would be other and different from what would be ordinarily expected. But if at the same time the Government

took sufficient care and precautions to guard the public from being deceived, I would not be able to say whether that was an improper use, but the jury could determine whether it was a proper or an improper use. I think it is safer to do it in this way.

Mr. Kremer: If there were actual notice to mariners of this light, although it might be improper, still the mariner would be bound by the notice, and he couldn't run into danger. But simply to get the expert testimony of this witness as to the lights is what was the object of the question.

The Court: I will sustain the objection upon the ground that the whole evidence must go to the jury, and then they must determine whether it is a proper or an improper use of the light.

Counsel for the defendant excepts to the ruling.

81 Q. Do you know whether prior to this 24th day of July, 1901, any department of the Government issued or published any notice supplementing the red light on the breakwater by a white light on the new pier? A. No.

Q. Would you have known of such a bulletin if one had been issued? A. Indeed I would.

Redirect Examination

Read by Mr. Smith:

Q. You say you are a mariner since 1867? A. Yes, sir.

Q. Where were you engaged as a mariner? A. Oceans and lakes all over the world.

Q. Since when have you ceased to be a mariner upon Lake Superior? A. 1895.

Q. 1895 is the last time you were a mariner upon Lake Superior? A. Yes, sir.

Q. How long have you run upon the great lakes? A. Since 1879.

Q. You have known of improvements being carried on by the Government engineers? A. Yes, sir.

Q. Don't you know they always light those improvements with a white light? A. Not necessarily.

Q. Not necessarily? A. No, sir.

Q. Did you ever see an improvement lit in any other way or marked in any other way than with a white light? A. Yes, sir, I have seen a red light.

Q. You have seen a red light? A. Yes, sir.

82 Q. When and where? A. I don't just recollect just when or where, but occasionally I have seen a red light.

Q. Where? Name one place. A. When they were building the Buffalo breakwater.

Q. When was that? A. 1899 I think.

Q. Have you seen one the last ten years, or since that time? A. No, I have not.

Q. You have always seen white lights then? A. Yes, sir.

Q. And mariners know that there are white lights on Government improvements? A. I can't say as to that.

Q. You knew when you were navigating up to 1895 didn't you? A. No, I did not.

Q. Just answer that question. A. I said I did not.

Q. Did you ever see any without a white light? A. I did in that case.

Q. What was that? A. They were repairing the old breakwater and had some pier work to do, and at the end of the pier there was a red light at that time.

Q. That made a very distinct impression on your mind? A. Yes, sir.

Q. You have seen lots of improvements since that time? A. Yes, sir.

Q. You have seen lots of improvements since that time, and you can't remember a single red light upon any of them? A. No, sir.

Q. They have all been white lights? A. Yes, sir, supposedly so.

Q. Supposedly so? A. Yes, sir.

Q. You said in answer to counsel's question, that if you were to see a white light you would be satisfied that it
83 was either a ship at anchor or a light in a house on the shore, didn't you? A. Yes, sir.

Q. Didn't you ever see a white light in a light house? A. Yes, sir.

Q. So you wouldn't know whether a white light was a ship at anchor or a lighthouse light? A. No, sir, no.

Q. You couldn't tell? A. No.

Q. Some of the lighthouses have red lights, and some of them have white lights, don't they? A. Yes.

Mr. Purdy: I want to read to the jury from page 251, of Bulletin No. 30, Notice to Mariners, dated Washington, D. C. July 29, 1899, which the witness testified was mailed to Captain McAvoy. (703) Lake Superior, Minnesota. Two Harbors. Information concerning breakwaters, Depth along side docks, the following information concerning the Government breakwaters at Two Harbors was obtained from Mr. J. H. Darling, U. S. Assistant Engineer.

The breakwater at the west side of the harbor is built to the length of 750 feet; the proposed extension of 250 feet in the same direction has been abandoned and in its stead an extension at an angle of 45 degrees southward 300 feet in length is

proposed, making the entire length of this (Eastern) breakwater 1,050 feet. This is also to be finished in the year 1900.

Information has been received from Mr. R. Angst, Chief Engineer of the Duluth and Iron Range Railway, that the least water on both sides of all the ore docks in Agate Bay,
84 Two Harbors, is 20 feet, 18 feet on both sides of the merchandise dock, and the same depth on the southwest side of the coal dock.

Mr. Purdy: I also want to read to the jury from page 340 of Bulletin No. 32, Notice to Mariners, dated Washington, D. C. August 11, 1900.

(859) Lake Superior—Minnesota—Two Harbors breakwater Caution—Referring to Notice to Mariners, No. 30, (703) of 1899, further information has been received that the work on the extension of the breakwater piers at Two Harbors has been actively carried on by the Government since the opening of Navigation.

A communication from the contractor, dated July 31, 1900, states that the submarine work on the extension of the east breakwater has now advanced so far as to leave only 16 feet of water over the embankment. Such a spot is located about 200 feet from the end of the old breakwater.

Masters of vessels are therefore cautioned, on entering the harbor, to give the old breakwater a berth of 300 feet, and not to round the east breakwater close on board, as formerly, on account of this danger.

Q. You knew that these were sent out when these improvements or this improvement was going on up there? A. Yes, sir.

Q. You have nothing to do, have you, with sending out this defendant's Exhibit "1", this list of lights and fog signals? A. We have them in the office for distribution for any one that calls for them.

85 Q. To any one that calls for them? A. Yes, sir.

Q. You have also these bulletins that you mentioned for distribution, and for any one that calls for them? A. Yes, sir, notices to mariners.

Q. This is issued once a year, this defendant's exhibit "1"? A. Yes, sir.

Q. On the cover of this exhibit it states: "Lights and Fog signals of the United States of the Northern Lakes and Rivers etc."? A. Yes, sir.

Q. This will be referred to hereafter.

Q. You know also, do you not, that this list of lights and fog signals—and that these lights are not changed upon any improvement, until the improvement is finally completed, and out

of the hands of the engineer in charge of the work or improvement, and turned over to the government, don't you? A. I don't catch that exactly. Will you repeat it please?

Q. You know, don't you, that this defendant's exhibit "1" this book of lights and fog signals of the United States, that it is not changed, and no changes are contemplated or made in that book until the Lighthouse Board actually changes the light, or puts it upon the new improvement after it has been entirely completed? A. No, sir. The Lighthouse Board always gives warning two or three weeks ahead of any proposed changes.

Q. Of any proposed changes? A. Yes, sir.

Q. Any lights that they are going to change? A. Yes, sir.

86 Q. Or any change they are going to make? A. Yes, sir.

Q. The Lighthouse board does not give any warning with regard to lights or take any notice of lights that are upon constructions or improvements that are in the hands of the engineers? A. No, sir.

Q. It does not do that? A. No, sir.

Mr. Kremer: I object to this because the notice is the best evidence of what the Lighthouse Board is doing.

The Court: The evidence will stand. I think it is proper. Counsel for defendant excepts to the ruling.

Recross-Examination

Read by Mr. Spencer.

Q. Unless there is a bulletin to the contrary, the Government reports is the mariners' guide as to the location and character of the lights, is that not so?

Mr. Purdy: I object to it as immaterial, incompetent, and irrelevant, and as improper cross-examination.

The Court overrules the objections and counsel for plaintiff excepts to the ruling.

Q. They must be augmented by the weekly notice to mariners, or else they are just for that date.

Q. And when they have been augmented, supplemented, supplanted, or followed by bulletins, they stand as the record of the lights, do they not? A. Yes.

Q. And each annual report is supposed to embrace
87 all the changes that were made by the bulletins of the previous year? A. Yes, sir.

Q. Do you know of any notice that the government gave of the moving back of the red light that was upon the pier at Agate Bay? A. Yes, sir.

Q. When? A. August 15th, 1891.
Q. That was the first notice? A. Yes, sir.
Q. How far was it moved back? A. Some thirty feet.

Court is here adjourned until ten o'clock the next day, at which time the case is proceeded with as follows:

The testimony of Captain David D. Gaillard, given on the former trial was read by Mr. Houpt as follows:

Captain David D. Gaillard, being next duly sworn, on behalf of the plaintiff, testifies as follows, on

Direct Examination

Mr. Houpt:

Q. What is your full name? A. David D. Gaillard.
Q. Where do you live? A. I am stationed now at Vancouver Barracks, State of Washington.
Q. How long have you been residing there? A. Since I left here on June 5th, of last June.
Q. Prior to June 6th you were living at Duluth?
88 A. I was living at Duluth previous.
Q. And for how long had you been a resident of Duluth? A. Since March 9th, 1901.
Q. Are you a Captain of the regular Army? A. I am a Captain of the Corps of Engineers of the United States Army.
Q. What was your position while at Duluth Captain? A. I was in charge of the works of River and Harbor improvements on the American shores of Lake Superior.
Q. What were your duties in that position? A. It was to direct plans for the construction of new works, to superintend their erections, and to supervise in general all works of River and Harbor improvements in the district described.
Q. What harbors were under your direction and supervision? A. Shall I give them by name?
Q. Yes, you may. A. Beginning on the north shore there was Grand Marais, Minnesota, Agate Bay, Minnesota, Duluth—Superior Harbor, Minnesota, Port Wing, Wisconsin, Ashland, Wisconsin, Ontonagon, Michigan, Portage Canal, Michigan, Presqu'ile, Michigan, Marquette, and Grand Marais, Michigan.
Q. What works or improvements were made in those harbors during the time you were stationed at Duluth? A. At Grand Marais, Minnesota, at Agate Bay, Minnesota, Duluth—Superior Harbor, and at the Portage Lake Canal.
Q. What was the character of the improvements made? A. It was a breakwater construction at Grand Marais, Minnesota,

and at Agate Bay Minnesota, dredging and pier work in Duluth—Superior Harbor, and breakwater constructions
89 and dredging at Portage Lake Canal.

Q. You are not a sailor yourself, and never have been? A. I do not claim to be a sailor.

Q. Captain state what kind of a light was displayed upon this new work, that you have described having been performed during the time you were located here at Duluth?

Mr. Kremer: Object to that. He should give the light on this particular pier, on this breakwater.

The Court: Objection overruled.

A. In each of these four cases the light was a white light.

The Court:

Q. What was the four cases? A. Grand Marais, Minnesota, Agate Bay, Minnesota, Duluth-canal and breakwater, and the Portage canal.

Mr. Houpt:

Q. I show you defendant's Exhibit "A", and ask you Captain if you know by whom that was prepared? A. I do.

Q. By whom? A. By the United States Lake Survey.

Q. Is that a correct representation of Agate Bay? A. It is.

Q. And of the breakwater on the west side? A. It was a correct representation at the time that the chart is dated.

Q. What is the date of the chart, Captain? A. It was issued March 6th, 1901.

Q. What do the dotted lines on that map represent? A. They represent work not completed.

Q. That was the extension of the old east breakwater? A. It was.

90 Q. It took an angle of how many degrees? A. About forty-five degrees of the original direction.

Q. Forty five degrees southwest? A. Yes, sir.

Q. By whom are these charts published? A. By the United States Lake Survey.

Q. And for what purpose captain? A. As aids to navigation.

Q. What are done with these maps after they are printed? A. They are sold. It states on the map the price of the chart.

Q. Where are they sold from? A. They are sold from Duluth, the office in Detroit.

Q. Are there any other names of distribution? A. I don't know of any.

Q. You say they are published as aids to navigation. Now in what way are they published as aids to navigation?

Mr. Kremer: Object to that question as irrelevant and immaterial, that shows for itself.

Mr. Houpt: The question is withdrawn.

Q. Do you know whether or not it is customary for masters of vessels to procure these maps as aids to navigation?

Mr. Kremer: Object to that question. The witness has not been qualified about the doings of the navigator; that question, assumes, of course, that he is familiar with what masters do.

The Court: Objection is overruled.

Mr. Kremer: Exception taken to the ruling.

A. I do know that they procured them.

Q. Captain, I will show you plaintiff's Exhibit "D", and ask you what that is? A. That is Bulletin 10, Corps of
91 Engineers, U. S. Army, surveys of Northern and Northwestern lakes.

Q. By whom is that document issued? A. That document is issued by the Engineering Department of the U. S. Army.

Q. At Washington? A. That bulletin was published at Washington I believe.

Q. And these are published for what purpose, if you know? A. It is stated on the back (the cover) of the bulletin. That, I think, is a clearer answer than I can give.

Q. What is done with these bulletins when they are published? A. They are sent to the various engineer officers on the Great Lakes for distribution.

Q. For gratuitous distribution? A. For gratuitous distribution.

Q. At how many points on the Great Lakes is Exhibit "D" placed for distribution? A. I would have to read that from the bulletin itself, I think there are eight, but it is stated on the back of the bulletin.

Q. Do you know Captain whether or not it is customary for masters of vessels on the Great Lakes to procure these bulletins? A. I can only state that they have called at my office for these bulletins.

Q. This is one of the points of distribution? A. One of the sub-offices. Detroit is the main office of distribution.

Q. This is a sub-office? A. Yes, sir.

Q. So some of these bulletins are sent to you for distribution? A. Yes, sir, some were sent at that time.

Q. At the time you were here? A. Yes, sir.

92 Q. Does your office have any connection with the Hydrographic office? A. No official connection whatever.

Q. These two offices are under a separate department of the Government? A. Yes, sir.

Q. You are under the War Department and the Hydrographic office under the Navy Department? A. Yes, sir.

Q. You have nothing whatever to do with the preparation or the distribution of exhibits "C" and "D" as I understand? A. Nothing whatever.

Q. These are publications prepared and issued then under the Hydrographic office, being a part of the Navy Department? A. They are.

Q. Was there any law or department regulation concerning the lights that are used upon new work, or work in the course of construction in these harbors?

Mr. Kremer: Object to that—the law will take care of itself, and the departmental regulation is entirely immaterial so far as the general public is concerned. As the departmental regulation is a private communication between the heads of the department and the subordinates, the law will take care of itself if there is a law.

The Court: I think that the jury have no right to assume that there is any regulation in the absence of proof.

Mr. Houpt:

Q. I will show you Plaintiff's Exhibit "F", and ask you what that is. A. This is a copy of the contract for the
93 construction of the breakwater at Agate Bay, Two Harbors, Minnesota.

Mr. Houpt: We offer it in evidence.

Mr. Kremer: Object to the admission of the contract between the Government and the contract—it matters not what that contract says about the construction. We assume that the Government had a right to construct and the Government was bound, and whether they provided this, that or the other thing in the contract, or whether the contractor broke his contract is entirely immaterial. The light was there, and we have a right to assume that it was put there by the Government.

The Court: What is the object.

Mr. Houpt: Of course, if the Court please, this work was done under authority of an Act of Congress.

The Court: There is no dispute as to that.

Mr. Houpt: This contract is made in pursuance of an Act of Congress. This contract is the best evidence of the time when the work was done. It is introduced also to show that this contract prescribed the light to be used upon that work, that light was placed there by direction of the Chief Engineer of the U. S. Government, who had authority to direct the light be used there; this contract is an Act of Congress and authority of the United States, which had jurisdiction of this question.

The Court: As I understand the counsel here, there is no dispute as to the fact that the Government had a right
94 to build this breakwater; there is no dispute that any construction which was made there was done under authority of Congress; there is no dispute that that construction was done by the Engineer Corps of the Army of the United States, and there is no dispute that there was a light on that structure.

Mr. Houpt: None whatever.

The Court: And no dispute that the engineer officers or whoever had charge of that construction, had a right to have that light put there.

Mr. Houpt: None.

Mr. Houpt: Does that render this contract immaterial?

The Court: In view of these admissions—if that is all the purpose—it is admitted on the record—the whole purpose is accomplished.

Mr. Houpt: That may be true that these matters now appear of evidence; but the contract is the best authority that we can introduce to show the power to go out there and put that light out.

The Court: It is admitted here that there was a light on the structure, and that the engineer had authority to have that light put there.

Mr. Houpt: But all the admissions that counsel can make cannot preclude us from introducing testimony which is material as we see proper to put it in.

The Court: The object is to prove facts, and if these facts are admitted, it is no use to put in the contract.

95 Mr. Kremer: We object to its introduction as immaterial and irrelevant.

The Court: Objection is sustained.

Mr. Houpt: Exception taken to the ruling.

Mr. Kremer: I am willing to admit that the Government had a right to put that light, or any other light there, but am not agreeing that they did put out the proper light, but that they had a right to put out that light, or any other light there.

The Court: In the absence of proof to the contrary the Court will instruct the jury that they are bound to presume that that was a light put there by those people who had supervision of the construction of that work.

Mr. Houpt:

Q. There has been some testimony here in regard to lights under the jurisdiction of lighthouse board, have you any connection with the lighthouse board? A. None whatever.

Q. Has the Lighthouse Board any supervision or jurisdiction over the work under construction, or while it is under the control and management of your office? A. None whatever.

Q. When you have completed your work to whom do you make a report, if anybody, of the completion of your work? A. I notify the Lighthouse engineer, or the inspector, as the case may be, for this particular district, that such work will be completed about such and such a date, and will be ready for such lights as he may see fit to put on.

96 Q. Then it passes from under your control or supervision? A. Only the light—the work never passes from under our supervision.

Q. The light itself? A. Yes, sir.

Q. That passes to the supervision of the Lighthouse Board? A. Yes, sir.

Q. And the Lightouse Board deals in what kind of lights?

Mr. Kremer: The Act of Congress for the regulation of the Lighthouse Board is the best evidence as to what kind of lights the Lighthouse Board deals in.

The Court: The evidence is that the work had never yet passed to the jurisdiction of the Lighthouse Board, and therefore that is the end of it. Under the testimony of this witness the Lighthouse Board would have nothing to do with this construction.

Q. This was still in process of construction at the time of the accident? A. It was.

Q. Captain you had personal knowledge of the construction of this breakwater? A. Yes, sir.

Q. I wish you would state how these cribs are constructed. A. The first step in the construction is to prepare an amount of embankment of stone of a size that would average possibly a cubic foot, and then when it gets about eighteen and a half feet of—

Q. What do you mean by cubic foot? A. An individual piece of stone that would be about a cubic foot, possibly somewhat larger or smaller, but that is about the size of the stone.

Then that amount of stone is built up until it gets with-

97 in eighteen and a half feet of the surface of the water.

The deepest water on the line of this extension was about forty-five feet deep. It is then leveled off at this depth of eighteen and a half feet below low water level of the lake, and then a crib is prepared, made of 12x12 timbers, rectangular in shape. the boxes were made in somewhat the general shape of the top of this desk the relative dimensions, and that is divided into a series of pockets, two longitudinal walls and several cross-walls of 12x12 timbers. This crib is partly filled with stone until it

floats very low in the water, and very nearly ready to settle on its bed of rip-rap, then they are put into the place they are going to stay. More stone is piled in until it sinks on to this prepared embankment of stone, and then the crib is completely filled with stone. That is called the crib proper to distinguish it from the superstructure. The superstructure is built in practically the same way, except that it is built of individual timbers. This crib being near the water level the superstructure is built on top of it, and as it is built up stone is piled in until it reaches a height of six feet above water. After it has been built up to six feet above the water level it is then decked over with six inch plank, and the length of the crib that I have described is fifty feet, and its width twenty-four feet additional in height. There were six of these in this extension—six of these cribs. The crib nearest the old breakwater was sunk first, and then another crib, which had been built in the meantime,
98 as soon as the weather permitted, was brought alongside, so they were sunk crib by crib until the end was reached. We were dependent upon the weather, the cribs having been prepared in advance, and it took two months to put them in. The first crib was sunk on May 15th, and the last, I believe, I have a note book here which I will consult to get the date, the last was sunk July 15th. At the time of the accident the superstructure was not completed, it being about eighteen inches or so above water.

Q. You say it was eighteen inches above water. Was that on the harbor side, or the lake side? A. I think that was on the harbor side—that it was about eighteen inches above.

Q. Then it ran down to the waters' level on the lake side? A. It ran down to the waters' level on the lake side at the extreme outer end. That had not been built as high.

Q. Do you know what the cost of repairing the damage to the breakwater was? A. Yes, sir.

Q. What was it? A. $4012.50.

Q. When was it repaired? A. I don't know the exact date we started, but we started the work of repairing as soon as possible after the accident. My impression is that it was not completed—a new crib was not sunk until in August. I remember having a new one built, but the weather was not propitious to sink it, and it may have been September before it was in place, August or September.

99 Q. The damage had been repaired by that time? A. It had been practically repaired.

Q. Now there is a breakwater on the west side of the harbor? A. Yes, sir.

Q. What is the length of that breakwater, do you remember? A. My impression is that it is about one thousand feet —I do not remember accurately.

Q. And the old breakwater and the new breakwater, is the length of those? A. I do not recall—I could easily determine it.

Q. The old pier is 750 feet and the new is 300 feet? A. Yes, sir.

Q. What is the width of the open between those two breakwaters into the bay? A. About 1300 feet—the clear opening.

Q. You mean east of the breakwater of which this work was an extension and the breakwater on the west side? A. Yes, sir, it is 300 feet between the end of the extension on the east side and the west breakwater.

Q. There is that much clear space to go into the harbor? A. Yes, sir.

Q. Do you know the number of vessels that entered that harbor during the year 1901? A. I have them.

Q. Up to the time of this accident? A. I have the number exactly.—I have it for 1901—the entire year. I have not got it up to the time of the accident, for the entire year it was 2798 vessels.

Q. Do you know what time that new work was
100 turned over to the Lighthouse Board? A. I know approximately. I could get the date accurately.

Q. As near as you can approximate the date? A. About November.

Q. Of what year? A. 1901.

Q. The same year of the accident? At that time was the white light mounted in the same relative position as at the time of the accident?

Mr. Kremer: Object to what was done after the accident.
The Court: Objection is sustained.
Mr. Houpt: Exception to the ruling.

Cross-Examination

By Mr. Kremer:

Q. Captain, the masters of vessels who were not where they could see this obstruction would get information as to its existence from what source? A. From the various bulletins —the Hydrographic and Engineering Department's bulletins, and from the chart of Agate Bay, I presume, and from inquiries here in Duluth, I presume. I don't know that.

Q. Your office issued no information to the public as to that improvement? A. We have no funds for the purpose of issuing notices.

Q. It is no part of the duty of the Engineer's Department to issue bulletins or publish information in regard to these structures? A. Yes, it is. We have two bulletins submitted in evidence to that effect.

Q. They were issued by the Hydrographic office?
101 A. No, by the Engineer's Department.

Q. Will you tell me which these are, I can find but one? A. Possibly I have seen but one—one was handed to me.

Q. Exhibit "D"? A. Yes, Exhibit "D" is such a one issued by the Corps of Engineers of U. S. Army, Survey of Northern and Northwestern Lakes.

Q. This bulletin may be obtained, so the note on the bottom says, upon application, from the several U. S. Engineers' offices, speaking of Duluth and other offices, so the pamphlet speaks for itself as to what it contains and what it is for, does it not, substantially? A. I should say it did.

Q. It is no part of the engineers' department to circulate, but simply to deliver them upon application? A. To deliver them gratuitously on application.

Q. There is a department of the Government that does publish information in relation to the improvements, additions, repairs, and changes, to the work carried on by the engineers' department, isn't there? A. I know of none except the engineer department that has knowledge of such work.

Q. Then the public is not informed of what is going on except as they come in contact with the work itself? A. They are informed through these bulletins, which are kept at eight places on the Great Lakes.

Q. That is all the information that the engineers' department gives? A. That and the charts.

Q. And the charts like the bulletins you have just
102 explained can be had upon application? A. Yes, sir.

Q. And in case of the charts they are sold, the price is demanded? A. They are sold.

Q. I ask you again, do you know of any department that published the information, publishes it at large, and sends it to sea-faring men, information which you have in relation to the changes and additions to piers and breakwaters? A. The Hydrographic office publishes such changes as they become conversant with.

Q. It is no part of your duty to notify the Hydrographic office of these changes? A. No, sir.

Q. Do you know how the Hydrographic office gets its information that it publishes in these various circulars as found in Exhibits "B" and "D"—do you know where they get that information? A. I can only state in general—they have come

to me personally and asked for it on more than one occasion, and I have always given it.

Q. You don't know what the duties of the Hydrographic office are? A. No, I do not.

Q. But you have seen these circulars? A. I have seen the circulars.

Q. You have, on application, given the information which the Hydrographic officials require? A. I have given it when asked for it on more than one occasion.

Q. Did you ever volunteer it? A. I cannot recollect that I did.

103 Q. Don't you remember Captain of sending the information to the Hydrographic office, reporting this accident to the extension of this break-water and the light on it? A. I remember furnishing it on application—on written application.

Q. Do you know where that application came from? A. I know of one such application—I don't know if it is the one you have in mind.

Q. Don't you remember of sending the information, in substance, I may not get it in detail right, that there was reported a collision with the extension of this break-water, and about the manner of lighting it, to the Hydrographic office at Duluth, did you make such a report after this disaster? [Q.] I remember after this disaster of getting a written request from the nautical expert in charge of the Hydrographic office in Duluth for information of the general character that you have described, and I furnished it to him.

Q. Do you know whether the Hydrographic office published any information as to the structure which was collided with, and the light that was on exhibition that night of the collision? A. I don't know of any such publication of the structure and the light previous to the accident.

Q. Do you know whether that information was published subsequent to the accident?

Mr. Houpt: Object to that question as incompetent, irrelevant and immaterial.

The Court: I think it is competent bearing on the question of the Plaintiff's action.

104 Mr. Houpt: It is objected to on the ground that it is incompetent, irrelevant and immaterial, for the reason that what a party does after an accident cannot be shown in evidence as bearing upon the question of his previous negligence. That is the rule. I cannot cite any Federal authority on that but that is the universal rule in the State Courts of Minnesota, and it has been repeatedly decided.

The Court: As a general rule I think that is true. Objection is sustained.

Mr. Kremer: Exception to the ruling.

Q. Captain were you in 1901 familiar with the laws of the United States which provided for the kind of lights that vessels should exhibit at night while under-weigh and at anchor? A. I was familiar with those that they should exhibit while underweigh, but I can't say that I am thoroughly familiar with those that they should display while at anchor.

Q. Then at that time you didn't know what kind of a light a vessel exhibited when she was at anchor, under the law I mean?

Mr. Houpt: Object to the question on the ground that it is incompetent, irrelevant and immaterial.

The Court: Objection is sustained.

Mr. Kremer: Exception to the ruling.

Q. Captain did you use that white light there on that breakwater because it was a light that a vessel at anchor usually displays? A. Because the chief engineer approved the specifications which called for a bright light, and I could not
105 have changed that light if I had wished to.

Q. Do you know whether or not the Government or any of its officials had in mind that that light resembled a light that was carried by vessels at anchor?

Mr. Houpt: Objection to the question as incompetent, irrelevant, and immaterial.

The Court: Objection is overruled.

A. I don't know.

Q. Who made the contract which provided for this light, did you or some other officer? A. My predecessor Major Clinton D. Sears, and the contractors then signed the contract, and it was then sent to Washington for approval by the Chief Engineer of the United States Army.

Q. You had nothing to do with the drawing up of that contract? A. No, sir.

Q. Did any one complain to you at any time prior to this disaster about displaying a white light there?

Mr. Houpt: Object to the question on the ground that it is incompetent, irrelevant and immaterial, whether any one complained to him or not would not affect the question of negligence or contributory negligence.

The Court: Objection is overruled.

Mr. Houpt: Exception to the ruling, please.

A. I do not recall any complaint prior to the accident.

Q. Did any one at any time either prior to the disaster or afterwards complain of the white light being used there?

Mr. Houpt: We object to any testimony bearing upon
106 what was said after the accident.

The Court: What complaint was made after the accident will not be permitted.

Q. Did anybody call your attention to the white light which was being used for lighting the end of this crib at any time prior to the disaster?

Mr. Houpt: Object to this question as incompetent, irrelevant and immaterial.

The Court: Objection is overruled.

Mr. Houpt: Exception taken to the ruling.

A. Mr. John Krey, Assistant Engineer did.

Q. Were you at that time informed by him or any other person prior to the disaster that the white light would deceive some men in going in there in the night time?

Mr. Houpt: Object to the question on the ground that it is incompetent, irrelevant and immaterial.

The Court Objection is overruled.

Mr. Houpt: Exception taken to the ruling.

A. No one made any complaint that I recall.

Q. Didn't you say that the Assistant Engineer did? A. Mr. Krey made no complaint. He called my attention to the large size of the white light.

Q. What did you mean by testifying at the first trial of this case in this court, in answer to this question: "Did anybody call your attention to the fact that a white light was being used in lighting up the end of that six-foot crib? A. My im-
107 pression is that somebody did. At this time I cannot recollect when or by whom." Did you so testify? A. I did testify that.

Q. And further: "Were you not notified that that white light would deceive some man coming in there some night, and bring about a collision between a vessel and that extension under water? A. I have an indistinct recollection that some one told me, asked me why I didn't use a red light." A. I did testify to that.

Q. That is a fact, is it not? A. It was after the collision I found since.

Mr. Houpt: I move that all of the testimony in the record relating to any notice that he received from any person concerning this light, excepting Mr. Krey's, be stricken out of the record, as it now appears it was all subsequent to the accident.

The Court: The jury will be instructed that it doesn't make any difference. Motion denied.

Q. Did you testify further on the first trial, as follows: "And at that time didn't they say that the fact that a red light was maintained 350 feet back from the extreme end of the breakwater during the progress of the extension, might lead some man into a trap and bring a vessel into collision with this new work?" And his answer is—

Mr. Houpt: If the Court please, we object to that testimony as not proper cross-examination in the first place.

* * * * * * * * *

108 The Court: I admitted the question asked whether any complaint had been made as to the danger of a white light prior to the happening of this accident. The object of this question is to direct his attention to certain testimony that he gave on the former trial, and in relation to the same point.

Mr. Kremer: After that last question was asked the Court made the statement, in reply to an objection by counsel for plaintiff, that "It depends somewhat upon when this took place, whether it was before the collision," and I said "I mean prior to this disaster", whereupon the witness answered. "A. I cannot recollect when it was as to this indistinct recollection that I have related, what the period was, whether it was before or after."

Q. Did you so testify? A. I did.

Q. The next question: "Have you any recollection now, any positive recollection of any one speaking to you after the
109 disaster about it?"

Mr. Kremer: That is objected to by counsel for plaintiff as immaterial, incompetent and irrelevant, and the Court rules that he may answer the question.

"A. I cannot recollect whether it was before or after. It was last summer, I should think."

Q. Did you so testify? A. I testified to that intent, I think those are my words.

Q. You have no authority you say, to change that light? A. None whatever.

Q. You were under the commands and instructions of your superior officers and these you had to carry out regardless of the consequences? A. I had.

Q. That is the duty of a soldier to obey orders? A. I had to carry out that contract as signed by the Chief of Engineers.

Q. Had you any experience with harbor work such as this prior to the time of your coming to Duluth? A. I had been on harbor work for four years, in Florida, from 1887 to 1891.

Q. Was that your whole previous experience in this kind of work? A. Yes, sir, harbor work, it was.

Q. You made no special study of the rules of navigation prior to your coming here, did you? A. Only so far as they concerned our works, I cannot claim to be a specialist on navigation laws.

Q. Did you ever devote any time or study to the subject of lights of vessels prior to your coming here, any special study?

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Mr. Houpt: This question is objected to on the ground that it is incompetent, irrelevant and immaterial, and not proper cross-examination.

The Court: Objection is overruled.

A. I have looked the subject up several times; but I have been a little confused on anchor lights, because I have seen vessels with a single white light, and with two white lights, and I don't know where the division comes in—I don't know what sized vessels are supposed to carry two, if any.

Q. Have you the communication, or can you furnish me a copy of the communication that you made to the Hydrographic officer at Duluth, giving the information in relation to the condition of this breakwater and the light? A. I have a copy of it. I recollect the fact that I gave him a memorandum, but there was no letter written whatever.

Q. Do you know what that contained? A. I cannot state.

Q. Wasn't it a formal communication from your office to his? A. My recollection is that it was a memorandum entirely.

Q. If it were a formal communication the records of the office would show it? A. They would show it.

Q. Have you examined the records to see whether there was a formal communication on that subject? A. I did on the previous trial, but not this time. They are not in my custody any longer.

Q. You did at that time find no such communication? A. No.

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Q. Did you communicate to your superior officer the condition of this break-water at any time between May 15th and the 24th of July? A. On the first of every month I gave him a report of its condition.

Q. And did you in that report state the condition of the breakwater, and also the character of the light that was being displayed there? A. I don't recall exactly what was said—I submitted a report on the first of each month, a report of the operations for each work under my charge.

Q. Did that state in the detail the progress of the work? A. It stated sufficiently in detail for one who had been cognizant of the previous reports to tell what had been done during the month.

Q. On the first of June did your report contain a statement that there were two cribs or one sunk on the new extension, sunk in place? A. I presume it did—I have not seen the report since it was made in that year, and my memory is not sufficiently good to recall the exact wording.

Q. But as a matter of routine you must have made a great many of these reports—can you tell me, as a matter of routine, whether it was probably in the report? [Q.] I think it was most certainly in there.

Q. Would it also contain information that you were exhibiting a white light on this extension? A. That I cannot recall, I do not know that. If it called for a white light in the contract I do not know that I would have considered
112 it necessary to mention it each month.

Q. Isn't it a fact that it would be such a matter of detail that you would not be likely to put it in? A. I do not recall whether that was in or not.

Q. Can you say now whether at any time you reported to your superior officer the fact that you were using a white light in lighting up that extension as the work progressed? A. I can't state whether I did or not.

Q. Do you remember, at any time, of your reporting lights under such conditions where you were doing similar work to your superior officer? A. I have no recollection of it. There were nine or ten works in the district, and I made a report each month on them, but I have no recollection of these minor details now.

Q. Can you tell me whether it was usual or unusual to put in the report anything about the lights? A. I am unable to recall any report.

Q. Do you know whether your superior officer knew except from the contract that had been made, or not, during that time? A. I have no knowledge that he knew that it was displayed or not.

Q. Do you know whether any officer of the Government outside of yourself and your subordinate knew of the existence of this light on this extension? A. Outside of myself and my assistants?

Q. Yes. Any other Government officers? A. I don't know, probably the light-keeper knew, he was within 300
113 feet of it twice a day.

Q. The light-keeper, at Agate Bay? A. Yes, I say probably he knew, I don't know that he knew.

Q. Was there any other officer of the Government excepting him that knew, or that might know? A. I am unable to state. I do not know what government officers are up there.

Q. Do you know of any? A. Personally I am not acquainted with any Government official there, excepting the light-keeper.

Q. Do you know whether there are any others there, even if you may not be acquainted with them? A. No, I do not, unless the Custom House Official. It is a branch Custom House I believe of this one at Duluth.

Q. Then Government officials you know of now were the Collector of Customs, if one was there, and the Light House keeper, they are the only ones? A. As far as I know.

Q. The extension, in this case, you say, on the harbor side, was about eighteen inches high at the time of this accident, and on the lake side it was level with the water? A. I think it was level with the water—that is my recollection.

Q. Isn't it a fact that the three cribs furtherest out were about a foot under water? A. My impression is that they were just about up to the waters' surface, they may have been an inch or two or three under or above water. They were working on them there—they were near enough to the surface for that. Each crib has four posts and they were several feet above the water.

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Q. Do you know how high these posts were out of water on the lake side—of the crib which was struck? A. They were quite low. My recollection is that they were a foot or so above water on the lake side, and four or five feet on the harbor side.

Q. There were no lights between the red harbor and the white light at the extremity of the new work, no lights in between? A. None.

Q. You have testified to this chart being a correct chart at that time, namely, March 6th, 1901? A. Yes, sir.

Q. Isn't it a fact that that chart shows in a dotted line the extension of which we have been talking, and that it is about two hundred feet from the light, and shows inside the dotted line a shallow spot on which there is marked 16 ft. of water? A. It does.

Q. Can you tell me now what depth of water was between the light and the shallow spot as marked within the dotted lines as 16 feet? A. I cannot, there are no soundings here that indicate what that depth was.

Q. But in the absence of soundings it would indicate a sufficient depth of water, wouldn't it, for navigation? A.

There are no soundings of any character given there, and there is shown on this map an extension contemplated, in dotted lines.

Q. But there is nothing to indicate that there is not ample water at all points along the extension except the spot
115 of 16 ft.? A. There is no indication of any sort, either that it is ample or insufficient.

Q. What was the object of marking the spot and putting 16 ft. on it? A. To show that the depth was 16 ft.

Q. Do you know why they did not put the depth in the rest of the dotted lines? A. It was greater than 16 ft., it must have been from the character of the coloring.

Q. Do you know what depth of water they considered as sufficiently dangerous to mark? A. That would depend entirely upon the draft of the vessel.

Q. Do you know captain as a matter of fact that your lines along the shore indicate various depths, running from five feet and under up to twenty feet? A. They show all intermediate soundings, as you see here, from six feet out to sixty feet, and over a hundred feet.

Q. But the blue lines? A. They embrace depths less than twenty feet.

Q. The place which is marked 16 feet is also in blue lines? A. Yes, sir.

Q. Because it was less than twenty feet? A. Yes, sir, on that date it was, but it was commenced that spring.

Q. There being no blue line there (pointing to chart) isn't it safe to say that the water was at least twenty feet deep? A. On March 6th, but not at the time of the collision.

Q. I mean at the time the chart was made. On March 6th, there was at least twenty feet of water over the entire proposed extension, excepting at the spot which was marked 16
116 feet? A. Except on the line which is marked 16 ft.

Q. And that is about how far from the light? A. Very near 190 or 200 feet.

Q. Do you know how far from the light it was that this crib was struck? A. One hundred and five feet about, from the red light.

Q. That would be about how far from this 16 ft., spot? A. It would be nearly one hundred feet, about ninety-five feet.

Q. For what purpose was the white light put on the extension? A. It was put there as a warning to mariners.

Q. To prevent what? A. To prevent their running on the breakwater in the process of construction.

Q. Do you know whether there were any lights being maintained on the west side break-water at this time, marking the opening? A. There were none.

Q. Do you know what light was used as the guide to entering Two Harbors prior to your putting that white light there? A. There were but two lights there, the Lighthouse on shore and this red light that was out on the end of the old pier.

Q. The red range light was the guide which was used in entering the harbor? A. I presume it was used for that purpose.

Q. Do you know of any other light except the light on the shore and that one that was put there as a guide to navigation? A. Except the large number of arc-lights on the ore docks.

Q. You don't mean that they were put there for that
117 purpose? A. No, sir.

Q. There are then a number of lights on the shore? A. Yes, sir, there are a large number of electric lights on the ore docks.

Q. Those are white lights? A. Yes, sir, but they are about one thousand feet from this break-water.

Redirect Examination

Mr. Houpt:

Q. Mr. Kremer asked you whether in your reports to your chief of the progress of your work did you mention the white lights, mention the lights? A. Yes, sir.

Q. Or whether it was customary for you to do so? A. Yes, sir.

Q. In the work you superintend in other places the contracts prescribed white lights as well as this contract didn't they? A. White lights were used, but I do not know whether they were prescribed or not—I presume they were prescribed.

Q. You simply remember that they were used? A. Yes, sir.

Q. Captain so long as the light was prescribed in the contract itself, and that contract had been approved by the chief engineer to whom you made your reports, would you be likely to mention your lights? A. I have no recollection of that at all, whether they were mentioned or not. I would not consider that I had made any grave omission if I failed to mention them, nor would I consider that I put in too much detail if I had mentioned them.

Q. Was it customary for you to put in your report
118 matter which was well known to your chief and to yourself? A. I didn't tell him that these cribs were built in accordance with the specifications—that was taken for granted.

Q. Anything that was in the contract and which was within the knowledge of the chief engineer you didn't feel it was part of your duty to report? A. I didn't consider it necessary, but I do not recollect whether I put them in or not.

The testimony of A. R. Porter, given on the former trial was read by Mr. Houpt as follows:

A. R. Porter, being next duly sworn, on behalf of the Government, testifies as follows, on

Direct Examination.

Mr. Houpt:

Q. Where do you live? A. In Duluth, Minnesota.

Q. How long have you lived here? A. I came here twenty years ago, but I have not lived here all that time.

Q. What is your business? A. I am a contractor.

Q. How long have you been engaged in that business?
119 about seventeen years.

Q. Have you been following any particular line of contract work? A. Well, we do a good many kinds of work—construction work—most anything in the way of construction.

Q. Have you done any construction work for the Government? A. Yes, sir.

Q. What kind of work? A. Built a breakwater.

Q. Where did you build breakwaters for the Government? A. We put in the foundation at Two Harbors, I think it was in 1897 part of 1896 and 1897, we finished in 1897.

Q. Was that the breakwater at Agate Bay? A. Yes, sir.

Q. Which breakwater was that, the east or west side? A. It was on the west side. This was just the foundation—preparing the stone work up to within 18½ ft. of the surface of the water.

Q. You just put in a foundation of stone. You didn't build the superstructure? A. No, only the cribs.

Q. Did you do any other work there at Two Harbors? A. Not for the Government.

Q. Did you do that under written contract? A. Yes, sir.

Q. For the Government? A. Yes, sir.

Q. Did they when that contract was made require you to display any particular light as a signal light—I am referring to the work at Agate Bay, the west breakwater?

The question is objected to by Mr. Kremer, considerable argument on both sides ensuing, and is withdrawn by Mr. Houpt.

Q. Did you display any light on your work there? A.
120 I do not think we did on that work, any more than on our barges, which we used for carrying on our business, on account of being in low water with our work. We didn't come within eighteen and a half feet of low water with that rock work, and there would be no necessity of putting out a light.

Q. You say you did not do any other Government work at Two Harbors? A. No, sir.

Q. Did you construct a break-water at any other harbor? A. Yes, sir.

Q. Where? A. At the entrance of the Portage Lake Ship Canal.

Q. What work did you do there? A. We built a very large breakwater there—I think we were there four seasons—something over a mile long I believe.

Q. Will you make a rough sketch of the appearance of the breakwater there, of the Portgage Lake Canal? A. I guess I can.

Q. Calling your attention to a A and B on the sketch, what do they represent? A. "A" represents the end of the west and "B" the end of the east break water.

Q. The opening between these two points would be the entrance into the harbor? A. Yes, sir.

Q. Outside of these lines A and B then would be the lake side? A. Yes, sir.

Q. And inside would be the Harbor? A. Yes, sir, that is the land line there.

Q. These two lines here, C and D is the canal? A.
121 Yes, sir, the entrance to the canal.

Q. What part of this break-water did you build? A. We built the whole of it.

Q. That is the four sides? A. Yes, sir.

Q. What was the length of the break-water that you built there? A. I think between fifty three and fifty four hundred feet. Somewhere close in there.

Q. That is on both sides of the Harbor? A. Yes, sir.

Q. How long were you engaged in that work? A. Four years.

Q. What is the width of the opening into the harbor between the two points of the breakwater, A and B? A. I could not state just exactly, it is somewhere in the neighborhood of 400 feet, it might be over 400 feet—I am not sure of that.

Q. It may be between four and five hundred feet? A. Yes, sir.

Q. You were four or five years in constructing that? A. We were four seasons.

Q. Did you also build the canal? A. No, sir.

Q. The piers for the canal? A. No, sir, they had been there a long time.

Q. During what years were those built? A. We finished in 1901. We started there in 1897 and we worked there four seasons.

Q. Did you display any lights upon this work while it was under construction? A. Yes, sir.

Q. What kind of a light? A. A white light.

122 Q. For what purpose did you display that light? A. I suppose it was to notify vessels that we were working there, and that the piers were under construction.

Q. Have you worked in any other harbor, Mr. Porter? A. Not here. I have in the east worked in other harbors.

Q. But not on Lake Superior? A. No, not on Lake Superior. I cannot recall any work we have done on Lake Superior outside of those mentioned.

Q. Have you observed any work in the course of construction in any other harbors on the lake? A. Yes, sir, I have seen work at Kevanaw (?) point, at the east end of the canal, from where we were working.

Q. When was that? A. At the same time our work was going on.

Q. Any lights displayed there, any signal lights? A. I can't say that I ever looked at those lights.

Q. You have no recollection of that? A. No, sir.

Q. Then your observation and personal knowledge of lights upon works of this character is limited to Portage Lake? A. Yes, sir, anything that I had anything to do with, or was interested in.

Q. You never was working on the east breakwater at Two Harbors? did you observe that? A. I don't believe I did, unless I went in there on a boat and out again.

123 Cross-Examination.

Read by Mr. Spencer:

Q. How wide is the canal at the entrance—the Portage Canal? A. The Canal proper?

Q. Yes. A. I think the canal is 180 feet wide.

Q. This break water is put there for the protection of that entry? A. Yes, the entrance to the canal.

Q. When you began the construction of these breakwaters you began at the shore end, didn't you? A. No, sir, we did not. The first crib that I sunk in this breakwater was on the west side of the angle, right at the end of the angle.

Q. That is the shore end of the angle? A. The shore end of the angle, which would be about 800 feet from the shore, is where that angle on the west side commences.

Q. What water did you have there, where you say it was about 800 feet from the shore? A. We had somewheres between 16 and 18 feet of water. I don't think it was a full sized crib put in there.

Q. That is what you called shallow water? A. Yes, sir.

Q. You began in shallow water and extended out to deeper water? A. Yes, sir. We worked from that point on the west side, finished that outer angle on the west side first, in order to get protection for ourselves to work.

Q. And where did you maintain the white light at both [sends]? A. Always at the outer end of the work, wherever it was—on the crib at the outer end.

124 Q. In that case did you maintain the light on the outer end or inner end? A. On the outer end.

Q. And the reason you did that was because you didn't expect vessels to go in around the inner end? A. No, it was too shallow.

Q. It was too shallow there? A. Yes, sir.

Q. The danger then was entirely at the outer end? A. Yes, sir.

Q. There are range lights on the canal piers? A. Yes, sir. There are range lights at the canal in the light house.

Q. Your observation was that the vessels would shape their course some distance away and come in a straight line with the opening? A. Yes, sir. A vessel on a range would clear the end of the crib, when it was complete, because the entrance to the harbor there is wider at the end of the breakwater than it is at the entrance to the canal.

The testimony of Walter L. Fisk, given on the former trial was read by Mr. Houpt as follows:

Direct Examination.

Mr. Houpt:

Q. Where do you live? A. I am stationed at present at Detroit, Michigan.

Q. How long have you been stationed at Detroit? A. Very nearly three years.

125 Q. What are your duties at Detroit now Major? A. I have charge of the survey of the northern and northwestern lakes, and the investigation of lake levels.

Q. Where were you before going to Detroit? A. Fort Smith, New Hampshire.

Q. What was your business at Fort Smith, New Hampshire? A. I was there in charge of river and Fortification work.

Q. Have you ever been in the chief engineer's office at Washington? A. Twice for the—of two or three months each.

Q. I will show you Government's Exhibit "A" and ask you whether that chart is published by your department, or similar charts? A. My work involves the preparation and the sale of these charts, the printing and sale of these charts.

Q. These are prepared, printed and published by authority of the Government? A. Under authority of an Act of Congress, and under orders of headquarters of the Corps of Engineers.

Q. What is the purpose of publishing them Major? A. They are published as aids to navigation primarily.

Q. When they are published what disposition is made of them, when they are printed? A. They are placed on sale, and a notification, as soon as the chart is issued, is sent out to the principal papers all along the great lakes, and they are then placed on sale at the cost of the paper and printing, making them very cheap. They are placed on sale at the headquarters of the Lake Survey at Detroit, also on sale at the office of the canal at St. Ste Marie, also on sale at the Engi-
126 neer's office in Buffalo, N. Y., Engineer's office at Duluth, Chicago, Milwaukee, Cleveland, and Oswego.

Q. And the price is five cents? A. That particular chart is five cents. The prices range from five cents to twenty-five cents.

Q. Do you know Major what the custom is of mariners on the Great Lakes about procuring these charts?

Mr. Kremer: Object to that question your honor. The testimony is that they were printed by the Government and marked down in price, and distributed at various offices about the Lakes, and that they can be had there by anybody. I cannot see that more can be done in the way of throwing light on that subject.

The Court: The question as to custom he may answer.

A. I do.

Q. What is the custom, Major? A. They are procured sometimes in person at the office in Detroit, others are procured by the masters in person at the other offices I have named. Many are also sold through the mails, and postal money orders or express money orders are sent, and very often postage stamps, the maps being mailed to the individual upon receipt of the price. A large number of them are sent out in all these different ways.

Q. They are very widely distributed in that manner? A. They are. I can give you the figures on the maps distributed.

Q. Do you know how many were distributed in 1901? A. I can tell you by referring to my memorandum.

127 Mr. Kremer: I object to how many were distributed.

Mr. Houpt: This is waived.

Q. This chart was prepared under your immediate direction? A. Under my immediate supervision.

Q. I will show you Government's Exhibit "D" and ask if you—in the first place, where bulletins of that character can be obtained?

Mr. Kremer: I object to that because the bulletin itself tells where they can be obtained.

Q. Can they be obtained at other places besides where the bulletin states on its face? A. They are mailed direct. This particular bulletin was mailed from the office of the Chief Engineer to a great number of vessel men upon the lakes. At present this work is done in my office, and they are mailed, in the vicinity of thirty or forty of this book.

Mr. Kremer: I move that the answer be stricken out, as to what had been mailed, and how these are prepared, and under whose supervision, as irresponsive.

The Court: All that part which is irresponsive may be stricken out.

Q. These are distributed gratuitously? A. Yes, sir.

Q. Do you know what the custom is of mariners to obtain these bulletins of that character?

Mr. Kremer: Object to that unless it is confined to this particular bulletin, and prior to this disaster.

Q. Prior to the disaster? A. They could be obtained upon application at any place I have named, and they
128 were issued with charts at that time. Copies of these bulletins were sent with the charts, the particular part relative to that chart which was purchased. They were prepared at that time with certain slips relating to certain charts—a certain amount of matter which related to one particular chart would be pasted on the chart itself.

Q. That chart was prepared in 1901 wasn't it? That bulletin I mean? A. It was issued early in 1901.

Q. Now did I understand you to say that there were charts at that time issued accompanying the bulletins? A. I said we issued these free of charge with the chart.

Q. Such as Exhibit "A" do you have reference to? A. That was one of the series of charts.

Q. Were the bulletins issued very frequently with the charts, or vice-versa?

Mr. Kremer: Object to that because it does not matter how frequently they may have issued bulletins. This case must depend upon the bulletins that relate to this case.

Q. Do you know Major of any other bulletin or chart having been issued by your department containing further information concerning this breakwater, between the time the construction was begun and its termination? A. This bulletin is an annual publication. The bulletin is intended to appear just before the opening of navigation each year, and during the year there are supplements issued from time to time as sufficient information of importance may be obtained, and are issued gratuitously the same as the bulletins.

129 Q. How was the information obtained that is contained in the bulletin? A. It is compiled from information which is sent in from the officer directly in charge of the works on the Great Lakes.

Q. And sent into the Chief Engineer? A. Yes, sir.

Q. Do you know Major from your personal observation what the custom is as to the kinds of lights that are placed upon the word under construction in the harbors upon Lake Superior? A. I do.

Q. What character of light is used customarily? A. Almost universally the light on construction work is white.

Q. A white light. A. Yes, sir.

Q. Do you know how long that light has been used for that purpose? A. It has been used [every] since I have known anything about river and harbor work, and that is some twenty years.

Cross-Examination.

Mr. Kremer:

Q. You know of no chart of Agate Bay issued for five cents, more or less, since this one was issued, this exhibit "A"? A. That same chart is issued from the office now, but it is corrected to the date it leaves the home office.

Q. I refer now to the date between March 6th, 1901, and the 24th day of July 1901, there was no other chart than this? A. It would be the same chart. If there were any changes in aids to navigation referred to me they would have been properly made subsequent to the receipt of the information.

Q. Would you put on that chart for instance an ex-
130 tension of a breakwater and the location of a white light to mark it? A. Where the break-water is above water we generally do that, and when we have sufficient information to locate the light with accuracy.

Q. In this case that was not done of your knowledge? A. When the chart was issued the work was still below the surface of the water as is shown in the dotted line on the charts.

Q. When this chart was issued on March 6th the condition of this breakwater at Agate Bay was as represented in this chart? A. Yes, sir.

Q. And then you say it is customary and usual for the engineer's office, as reports come in relating to extensions of breakwaters and piers, to mark them on the charts? A. I said my office did that. Any chart which is issued from my office and subsequently information comes in regarding a change of buoy or light, etc., all copies issued subsequently are changed accordingly.

Q. Was it your office that issued this particular chart? A. My office issued that chart.

Q. Then it became the duty of your office to issue charts showing the extension? A. Yes, sir, we do.

Q. You don't know whether it was done in this case or not? A. I would have to see one of the present charts we issue.

Q. You have no recollection of any chart being issued between March 6th and July 24th, 1901, showing a different condition of things than are marked on this chart? A. I
131 could not recall definitely anything without referring to the records on that.

Q. You know of none now. A. I can recall none.

Q. Then on the 24th day of July, so far as you know, this was the chart giving the information in regard to Agate Bay? A. Yes, sir.

Q. And if a mariner had that chart and the circular marked Exhibit "D", he would have all the information that the Government officers had published? A. I do not know what may have been done by other people. I would say that he had what had been issued by my office.

Q. This chart "A" represents all that was issued by your office, so far as you know? A. Yes, this bulletin was issued by the Chief Engineer.

Q. Do you report anything to the Hydrographic office? A. I do not.

Q. Do you know how the Hydrographic office obtains its information in regard to changes, and lights and breakwaters? A. How they obtained this particular information?

Q. Similar information? A. By asking questions about them.

Q. It is no part of the duty of the engineer's department, or the war department to inform the Hydrographic office or navy department of these changes? A. I think not.

Q. The Light House board belongs to what department of the Government? A. At present it is in the department of—it has been a part of the Treasury department.

Q. Formerly it was a part of the Treasury Department? A. Yes, sir.

132 Q. We have then, the War Department, instructing the contractors, the Navy Department through the Hydrographic office giving notice of changes to mariners, and

the Treasury Department, working through the Light House Board, looking after the lights and fog signals? A. The Engineer's Department also publishes information similar to that of the Hydrographic office.

Q. You say that the engineer's office's information was an annual publication, such as Exhibit "D", as you hold in your hand? A. Supplemented by different information coming out at different times during the year. Generally these supplements were issued once a month.

Q. Do you know whether any supplements were issued that showed the extension of this break-water, the actual extension of it, between the date of the publication in Exhibit "B" of June 24th 1901? A. I could not say definitely.

Q. You don't know? A. I could not say without referring to copies of bulletins themselves.

Q. You know neither one way or the other? A. At present I could not say. I would have to look up the bulletins to find out.

133 The testimony of Hugh Steele, given on the former trial was read by Mr. Houpt as follows:

Direct Examination

Mr. Houpt:

Q. You live in Duluth? A. Yes, sir.

Q. How long have you lived here? A. About eighteen years.

Q. What is your business? A. That of contractor.

Q. Have you ever done any work for the Government in that line? A. Yes, sir.

Q. Where? A. Two Harbors—two contracts in Two Harbors—built about a mile of break-water in Ashland, Grand Marais, Michigan, Duluth, Minnesota.

Q. You had breakwater contracts in these harbors you have mentioned? A. Yes, sir.

Q. During what years did you do this work, Mr. Steele? A. I built the first four hundred feet in Two Harbors in 1886.

Q. That was on the west side? A. On the east side. I built some more breakwater in Two Harbors in 1900. In Ashland I built that along ten or twelve years ago. In Grand Marais, Michigan, about the same time. I built one of the canal piers in Duluth here, me and my partner, we commenced in 1898 and completed it in 1900.

Q. Generally then you have been for the last twelve years almost continuously engaged in this work, off and on? A. Not continuously, but off and on for a few years.

Q. With a few interruptions? A. Yes, sir.

134 Q. Now Mr. Steele, I will ask you generally regarding this work, whether you displayed a signal or warning light on the work during its progress of construction? A. I have always where we were near a channel—I have done some work away from a channel, where there was no possible chance for a steam-boat to strike it, but any time we were near a channel we would display a light for our own protection, and according to the specifications.

Q. That is whenever your work was out in a channel where a vessel was liable to sail you would display a light? A. Yes, sir.

Q. What was the kind of light that you displayed? A. A white light.

Q. Did you display any other kind of a light as a signal light? A. No, sir.

Cross-Examination.

Mr. Kremer:

Q. Did you ever know of a redlight being used? A. No, I don't think I do.

Q. Ever use one? A. No, sir.

Q. Did you ever use a red light at all for warning of any kind? A. Not on Government work, I did on street work.

Mr. Houpt: Move that be stricken out, as incompetent and irrelevant.

The Court: I think we had better confine ourselves to the kind of lights used in the harbors and on the water.

135 Q. Why did you use a white light on the Government work? A. Because a white light was specified.

Q. And that is the only reason why you used it? A. I guess it was cheaper probably.

Q. You had to use it when it was specified in the contract? A. Yes, sir.

Q. There was no option for you to exercise ? A. No, sir.

Q. There was nothing to prevent you from using a red light if it had not been specified? A. Not that I know of.

Q. You say that you used this light for the protection of yourselves as much as for the protection of vessels? A. Yes, sir.

Q. What do you mean by that? A. I mean that if a work was damaged by a vessel running into it, before it was accepted by the Government, the contractor would have to stand the damage, so as a usual thing he displays a light for his own protection as well as to follow the specifications.

136 The testimony of F. P. Tims, on the part of the Government given on the former trial was read by Mr. Houpt, as follows:

Direct Examination.

Mr. Houpt:

Q. You live in Duluth? A. Yes, sir.

Q. You are a contractor? A. Yes, sir.

Q. And have done contracting work for the Government? A. Yes, sir.

Q. Building breakwaters? A. Yes, sir.

Q. Where? A. We built some breakwater at Ashland, Port Wing, Presqu'ile and Marquette.

Q. Between what years was this work done? A. It has all been done in the last five years.

Q. Did you use any lights on this work? A. I did.

Q. What kind of a light? A. A white light.

Q. Why did you use a white light? A. More from custom than anything else I know of.

Cross-Examination.

Mr. Kremer:

Q. Was it specified in the contract? A. I didn't think it was specified—a white light.

Q. Was this Government work you did? A. Yes, sir.

Q. Do you know whether it was in the contract or not? A. I think the contract specified a "suitable light."

Q. Who determined that, the engineer officer and you together? A. I don't remember of ever having it up with any one —there never was any question about it.

137 Q. When was it that you used these white lights, what years? A. We used them in 1890, 1900, 1902, and 1903, and the present season.

Q. Where did you use a white light in 1901? A. In the Portage Lake Ship Canal in Michigan.

Q. At the Portage entry to the canal and break-waters there? A. No, on the abutment work along in the canal—on both sides of the canal.

Q. That was on the banks of the canal? A. Yes, sir.

Q. That is where you used the white light? A. I have always used them—that is where I used them.

Q. What is the other place where you used them, the white lights, prior to 1901? A. I used them in the same canal in 1899 and 1900, I was there two seasons.

Q. All along the banks of the canal? A. Yes, sir.

Q. Where else did you use it prior to 1901? A. I cannot recall. Prior to 1901?

Q. Yes. A. I can't recall from personal knowledge. While I was connected with the breakwater we built at Ashland in 1899 I wasn't there, and from personal knowledge I cannot testify as to that.

Q. Then your testimony amounts to this, that while you were working along the banks of the Portage Lake canal you were using white lights while that work was in course of construction? A. You have reference now to previous to 1901?

Q. Yes. A. Yes, sir.

138 Q. That is all you can testify to positively prior to 1901? A. That is all I think of at present.

The testimony of Francis L. McDonald, on the part of the Government, given on the former trial as read by Mr. Houpt, as follows:

Direct Examination.

Mr. Houpt:

Q. You live in Duluth? A. I do, sir.

Q. You are a contractor? A. Yes, sir.

Q. Have you done some contracting work for the Government? A. I have sir.

Q. Have you built any breakwaters in the harbors on Lake Superior? A. Yes, sir.

Q. During what years were you engaged in the performance of that contract? A. The first contract was in 1891 in Agate Bay.

Q. In which side of the Bay? A. On the east side of the bay.

Q. How long were you doing that work? A. One season.

Q. What kind of a light did you display there? A. A white light.

Q. Where next did you do any work? A. At Portage Lake, contract work.

Q. When was that? A. I believe it was in 1893.

Q. How long were you engaged at that? A. I was there about two months.

139 Q. Did you display any signal light there? A. I did sir.

Q. What kind was it? A. A white light.

Q. Did you work any place else? A. Yes, sir, I worked—as a contractor, do you mean?

Q. Yes. A. Yes, I worked at Grand Marais, Michigan.

Q. What time was that? A. That was in 1896.

Q. How long were you engaged in working there? A. A whole season.

Q. What kind of a light did you display, if any? A. I do not think I displayed any light there, at Grand Marais, because there was no necessity for it.

Q. Is there any other place, Mr. McDonald, that you built breakwaters? A. I have had contracts under another department than the engineering department. I have been under the light house and under the Treasury Department.

Q. Did you build some work under them? A. Yes, sir, under the Light House Department.

Q. Now, do you know what the custom is of displaying lights on new Government work in the various harbors on Lake Superior? A. I have always displayed a white light. I have been on other works but not as a contractor.

Q. Have you seen the same kind of light displayed on other works? A. Yes, sir.

Q. Do you know of any reason why a white light is used in preference to other lights on this work? A. No, I do not know why it should be; unless it is seen at a greater distance.

140 Cross-Examination

Mr. Kremer:

Q. Did you ever see a red light displayed as a warning signal? A. On public works?

Q. Yes. A. None on the lakes. I have seen it in the city, on Municipal work, and railroad work.

Q. Did you ever see it displayed in connection with piers and break-waters and buildings in the waters, obstructions to navigation in the waters? [Q.] No, I have not on any of the works I have been on— I have never seen a red light displayed.

Q. Did you on work that you were not on? A. I have no recollection.

Q. Will you say now that red lights are not used on some public constructions, which are in effect a menace to navigaton? A. It may be used—I believe they were used on steamers—I have seen red lights used on steamers,—on motion. I have never seen any used on construction work on the water. I have seen red lights used on municipal work and railroad work.

Q. I refer to any kind of work, whether railroad work, or municipal work, that interferes in any way and obstructs navigation, whether it is by municipality or by railroad? A. The Government use red lights for ranges I believe, so far as I know, I think they use flash lights of red color, something of that kind.

Q. I am asking you now whether you have ever
141 known of a railroad or municipality or an individual, or anybody else, using a red light to light up anything that in any way interfered with navigation, like a bridge, or a dock, or a pier, or house?

Mr. Houpt: Object to the question as too broad, and not confined to the subject under investigation.

The Court: I think he may answer that.

A. I don't know that I have ever seen it on the water, but I know that a red light is a signal of danger. I believe it would be anywhere you saw it. I would consider it a danger signal.

Mr. Houpt:

Q. These red light you have mentioned, they are fixed stationary lights? A. Which one?

Q. You saw red flash lights, so you said? A. Used by the light house, was it?

Q. Yes. A. I think so.

The testimony of Captain David D. Gaillard, on the part of the Government, given on the former trial, was read by Mr. Houpt, as follows:

Mr. Houpt:

Q. I show you Government's Exhibit "E", and ask you first what that is? A. That is a blue print of Agate Bay showing the ore docks, and also somewhat in detail an extension of the east breakwater and the position of the cribs—especially of the wrecked crib—the crib that was struck by the Shenandoah.

Q. Is that a correct representation of what it pur-
142 ports to represent? A. It is.

Q. Made by yourself? A. It was made in my office under my direct supervision, but not by myself.

Q. You know it is a correct representation of the situation there as it was after the accident, after collision, that is with reference to the point shown on the map where the collision occurred? A. It is.

Q. This map of course was made after the collision, subsequent to the collision? A. After the collision, and submitted with a report to the chief engineer of the collision.

Mr. Houpt: If the Court please, we offer in evidence Exhibit "E", for no other purpose than simply to show the situation, as it is a correct representation of the break-water, and there is a sectional view of the cribs as they were put in, and for showing the point in the break-water where the collision occurred.

Mr. Kremer: Object to its introduction because this is a representation of the scene after the disaster, and because it throws no light on the controversy that we have not already had. There is no dispute as to the collision; there is no dispute which crib was struck; there is no dispute as to where the crib was struck; there is no dispute as to the damage, and there is no dispute as to the condition at all. Etc.

Considerable argument is indulged in resulting in Mr.
143 Houpt stating that if he is privileged to use this Exhibit "E" in addressing the jury he will ask for nothing further. Mr. Kremer consents to this, and the Court says:

The objection is sustained with the understanding that the Exhibit "E" may be used in the argument to the jury as being a correct representation of the situation there.

The testimony of B. F. Howard, on the part of the Government, given on the former trial was read by Mr. Houpt, as follows:

Direct Examination.

Mr. Houpt:

Q. You live in Duluth, Captain? A. Yes, sir.

Q. How long have you been a resident of this city? A. About thirty years.

Q. What has been your business? A. I have been sailing for the last ten years.

Q. Are you an active sailor now? A. No, sir, not this season.

Q. Were you last? A. Yes, sir.

Q. And the previous seasons during the past ten years? A. About that, yes, sir.

Q. In what capacity do you sail? A. I have been a master of steam vessels—sailing the steamer Argo last summer.

144 Q. What ports did you touch at while you have been sailing on the lakes? A. Almost all of my sailing has been around the head of the lakes for the last five or six years.

Q. What ports did you make? A. We made Duluth, Superior, Bayfield, Ashland, Ontonago, Portage Lake, and Marquette, on the south shore, and Duluth, Two Harbors, Grand Marais and Port Arthur on the north shore.

Q. Captain. I will show you Government's Exhibit "B" and "C" and ask you to examine them—they are called Notice to Mariners? A. Yes, sir.

Q. Have you ever seen publications of that nature before? A. Yes, sir.

Q. What is the custom of masters of vessels as to receiving notices of that nature?

Mr. Kremer: I object to that your honor, it is irrelevant immaterial and leading.

* * * * * * * * *

145 The Court: I think he may answer the question.
Mr. Kremer: Exception to the ruling.

A. Do you mean that, how they were received?

Q. Whether as a matter of fact a master of a vessel receives these notices to mariners, whether that is the custom?

The Court: You cannot establish a custom as to whether he receives these or not—that is a matter of fact.

Q. Whether they are sent to mariners customarily?

Mr. Kremer: Object to that as not the best evidence, because the Government knows whether they are sent or not. This man does not know whether they were sent.

The Court: He may testify in this way, as to whether it is customary for mariners to obtain these bulletins. Let the question be amended, and strike out the former question.

Q. State whether or not it is customary for mariners of vessels to obtain these notices to mariners issued by the hydrographic office.

Mr. Kremer: Object to the question as irrelevant, and immaterial, and not the best evidence.

The Court: Objection is overruled.

A. I think it is, I have always received them.

Q. What is the custom as to reading them and being guided by the information contained in the notices?

Mr. Kremer: Object to that as asking this witness what the law is.

146 The Court: Objection is sustained.

Q. State whether or not you were guided by the information contained in the notices?

Mr. Kremer: Object to that question—the witness is incompetent to testify any further than his own conduct as to whether or not he is guided by such information. It is incompetent and irrelevant.

The Court: I think the first inquiry should be if he knows that there is a custom, and then find out what the custom is.

Q. Do you know what the custom is among the masters of vessels in observing and being guided by the information contained in these notices?

The Court: That can be answered by Yes, or No, whether you know or not, is the question.

A. No, sir, I do not.

Q. In your experience and observation as a sailor, do you know the kind of light that is displayed in harbors upon breakwaters and piers in this district during the process of construction by the Government?

Mr. Kremer: That is objected to as irrelevant and immaterial.

The Court: That is as to the character of light displayed on construction work while it is in process of construction. I think the witness may answer.

Mr. Kremer: Exception to the ruling.

A. I do.

147 Q. What kind of a light?

Mr. Kremer: Same objection as before—irrelevant and immaterial.

The Court: Objection is overruled.

Mr. Kremer: Exception to the ruling.

A. A white light.

Q. Have you ever known of any other kind of a light on Government work of that character being displayed? A. I do not think I ever did—not to my recollection.

Cross-Examination.

Read by Mr. Spencer:

Q. Where did you ever see a light on Goverment work in the course of construction? A. At the construction of the break-waters at Two Harbors, Grand Marais, Minnesota, Duluth-Superior harbor work, some work at Ashland, some work at Ontonagon, the break-waters at the Portage Lake Canal, and the improvement at the Portage entry and some work at Marquette, Michigan.

Q. You were at that time engaged in navigation? A. Yes, sir.

Q. What vessel? A. During the seasons of the principal building of the break-waters at the Portage canal I was sailing the steamer "Bon Voyage."

Q. What kind of a vessel is that, a tug? A. No, sir, it is a passenger and freight steamer.

148 The testimony of Captain C. O. Flynn, on the part of the Government, given on the former trial, was read by Mr. Houpt, as follows:

Direct Examination.

Mr. Houpt:

Q. Captain where do you live, in Duluth? A. Yes, sir.

Q. How long have you lived here? A. Twenty one years.

Q. What is your business? A. I have been in the steamboat business ever since I have been here until this last season.

Q. You have been in the steamboat business? A. Yes, sir.

Q. In what capacity? A. Sailing them, master of them.

Q. What capacity did you serve in before you became master? A. Mate, wheelsman and watchman.

Q. So you have followed what is called a sea-faring life for the last twenty years? A. Thirty odd years.

Q. Where have you sailed? A. I have been on Lake Superior for the last twenty one years.

Q. Have you been in and out of all ports on Lake Superior during that time? A. Yes, sir.

Q. How frequently for instance would you be in and out of Two Harbors, taking that as an illustration, during a season? A. Probably a dozen or fifteen times during the season.

Q. Were you sailing in 1902? A. Yes, sir.

Q. Did you enter and leave that harbor in that year? A. Yes, sir.

Q. How often do you think? A. I have been in and out of there several times.

149 Q. During that year? A. Yes, sir.

Q. If you know, you may state, the source of master's information concerning the condition of a harbor or harbors on these great lakes?

Mr. Kremer: Object to that question as irrelevant and immaterial.

The Court: Objection is overruled.

A. I have been getting these bulletins from the War Department, and occasionally from the Hydrographic office.

Q. From what offices are the bulletins issued? A. The War Department.

Q. The Notice to Mariners? A. Yes, sir.

Q. Now, are there also charts issued? A. Yes, sir.

Q. Is that a source of information to mariners? A. Yes, sir.

Q. In your experience as a sailor upon the lakes, Captain have you observed the character of light displayed upon Government work in harbors, such as piers and breakwaters? A. Yes, sir.

Q. In the course of construction what is the character of the light displayed, or the kind of light?

Mr. Kremer: Object to the question as irrelevant and immaterial.

The Court: Objection is overruled.

A. A bright light.

Q. By that you mean a white light? A. Yes, sir.

Q. Have you ever known of any other kind of a light being displayed? A. No, sir.

150 Cross-Examination.

Mr. Kremer:

Q. Do you rely upon the Notice to Mariners from the Hydrographic office to inform you as to the condition of things in the ports which you are not seeing every day? A. Well, I refer to that in case I should go into a strange port. I look them over.

Q. And would be guided also by the chart that you had? A. Yes, sir, certainly.

Q. And by the Lighthouse beacon? A. Certainly.

Q. Do you know whether the Government promptly sends out information in regard to these changes in the harbors such as take place about break-waters and lights? A. I could not say—they have sent me circulars quite often.

Q. Do you know whether it is customary to send such information out promptly? A. I could not say whether it was or not.

Q. What do you as an expert mariner [—] as to whether notices of that kind should be sent out promptly, or not? A. I think so.

Q. If an obstruction is put in in May what do you say as to a notice being given of that in August as to whether that is a prompt notice or not to Mariners? A. I should say not.

Q. How soon would you say that notice of an obstruction in May should be given to Mariners, such as sinking a crib in a breakwater? A. I should think it would be necessary to notify them ahead of time.

151 Q. Really before the crib was sunk? A. Yes, sir.

Q. To wait until the crib was sunk would be rather late notice to Mariners? A. Somewhat.

Q. Isn't it a fact that a mariner, for instance whose notice comes to one port, might not get that notice because it might not reach that port for days, isn't that a condition that is liable to prevail? A. I presume so.

Q. What do you say as to whether the Notice to Mariners should also contain notice of any lights that are used on these structures? A. Yes, sir.

Q. As a mariner are you familiar with the lights that are used on vessels? A. Somewhat, yes, sir.

Q. What does a signal of a white light, when accompanied by a red or green light, mean to mariners, particularly in the water of a bay? A. They usually signal with a white light when lying at the dock or lying at anchor.

Q. Suppose you saw such a light out in the bay, what would you say it would mean? A. I should think it was a boat at anchor, or an obstruction of some kind—they use them on rafts also.

Q. Suppose you had no knowledge of an obstruction, or the light on the obstruction, and you met a light in the bay, what would you take it for? A. I would go kind of slow and find out.

Q. What would you take a signal light meeting it in the bay like that for, supposing that you had no notice that there was any obstruction or danger, or any notice that there would be a light at that point, and supposing you were going slow?

152 A. I would think it was an obstruction of some kind, if I could not see the vessel it was hanging on.

Q. Suppose it was so dark you could not see whether it was a vessel or not? A. If you would go up close you probably could see the rigging.

Q. Would you not be likely to take it for a vessel, without any notice of there being a vessel there—a vessel at anchor, or an obstruction? A. It is pretty hard matter to tell.

Q. You might take it for a vessel at anchor? A. Might, possibly.

Q. It would not be an unusual thing to find a vessel at anchor in the bay? A. Certainly not.

Q. And if you met a light like that in a place where it was not unusual to find a vessel at anchor, you might take it for a vessel at anchor? A. Might possible.

Redirect Examination

Mr. Houpt:

Q. Showing you Government's Exhibit "E", being a blue print, and observing the outer end of the new breakwater, at which point a white light was displayed, I will ask you Captain, whether a prudent mariner, approaching that bay for the purpose of entering it, would mistake a light at that position for a ship at anchor?

Mr. Kremer: Object to that. It seems to me that he is asking for an opinion on the whole case. Now the witness practically becomes a juror. It is for the jury to say that, under all the facts and circumstances of this case.

153 The Court: I think that is a matter for the jury. He has stated that these lights were, and all that sort of thing.

Q. Where were ships usually at anchor, Captain, about a bay?

Mr. Kremer: Object to that, that is too general and cannot throw any light upon this case, unless it is confined to this place.

Q. At Two Harbors? A. Inside the harbor.

Q. Did you ever know of a vessel at Two Harbors to be anchored outside of the harbor? A. No, sir.

Q. What was the practice in 1901, if you know, concerning a loaded boat entering that harbor for the purpose of getting a tow, would the vessel itself enter the harbor and bring out the tow, or would the vessel lay outside of the harbor, and whistle for the tug to bring out the tow?

Mr. Kremer: We object to that. The Shenandoah had a right to enter Agate Bay.

The Court. The objection is well taken.

Recross-Examination

Mr. Kremer:

Q. How many times have you been at Agate Bay in the night time? A. I sailed a tug out of there for six seasons.

Q. Did you ever know of a vessel letting go her anchor as she came into harbor to wait for the tug? A. When they first built the ore docks there wasn't room enough for all of the boats to lay at the dock, for a time, and they occasionally lay at anchor before the break-water was there.

154 Q. And it was a common thing for a vessel to let go her anchor until she could get to the dock? A. Until there was room for her.

Q. In a case of that kind at that place she would display one white light as an anchor light? A. Yes, sir, certainly.

Q. Does it ever happen that a vessel will drag her anchor if it is blowing hard? A. Yes, sir.

Q. And then she might drift out of the usual anchorage? A. Certainly.

Q. And that is more liable to occur when there is a gale of wind blowing than at any other time? A. Yes, sir.

Q. Are there not a great many white lights on the shore there that are burning in the night time? A. There are lights on the ore docks there.

Q. Are there no lights in the streets, street lamps? A. Yes, sir, and lights in the offices too.

Q. There are other lights ashore besides the ore docks lights? A. Yes, sir.

Q. Can you always tell in the night time the exact locality of the object on which a light is located on a dark night? At a distance? A. Could I tell the exact locality on which a light was located?

Q. Isn't it difficult to locate an object on which a light is on a dark night? A. Yes, sir.

Q. And looking into a large number of white lights isn't it difficult to pick out which one is nearest to you and which one is furtherest from you, sometimes? A. Take it at Two

155 Harbors, when you get up close to the piers there the whole harbor is lit up. You can see the whole harbor there.

Q. But before you get to the harbor, when you are outside? A. It would be a pretty hard matter to gauge the distance between.

Court now takes a recess until two o'clock P. M. the same day, at which time the case is proceeded with as follows, on the part of the government.

156 Mr. Houpt: At this time I desire formally to offer in evidence Exhibit "A", which is the chart of Agate Bay, referred to in the testimony.

Mr. Kremer: I want to object to this, because it purports to be a chart issued March 6th 1901, and because it shows a condition which was not the condition at the time of this disaster.

The Court: I think the objection will be overruled.

Counsel for defendant excepts to the ruling.

Mr. Houpt: I also offer in evidence Exhibit "D", being Bulletin No. 10, dated April 1, 1901, issued by the Engineers' Department.

The Court: These are all Exhibits that have been referred to in the testimony?

Mr. Houpt: Yes, sir.

Mr. Kremer: I want to object to the introduction of Exhibit "D", for the reason that the pamphlet is not one of which Mariners are by law bound to take notice, and as being one which is not sent to Mariners or placed before them.

The Court: The testimony is that it was here in the Engineer's office and could be gotten by Mariners if they desired it. I think the objection will be overruled.

Counsel for defendant excepts to the ruling.

Mr. Houpt: This Bulletin No. 10, is to supplement the information given upon the charts of the Great Lakes, and will be issued with those charts from the office U. S. Lake Survey Detroit, Michigan.

157 This Bulletin may also be obtained upon application, from the following U. S. Engineer offices; Duluth, Minn. 519 Providence Building; Milwaukee, Wis. Custom House; Chicago, Ill. 1637 Indiana Ave.; Grand Rapids, Mich. 57 Park Street; Detroit, Mich., Campau Building; Cleveland, Ohio, Hickox Building, 185 Euclid Avenue; Buffalo, N. Y. 540 Federal Building; Oswego, N. Y. Second National Bank Building.

On page 5 of this pamphlet appears as follows: "Agate Bay Minn. (Two Harbors.) Before improvement, fully exposed to winds from southeast and to heavy swells from northeast and southwest winds. January, 1901,—The West breakwater has been completed and is 900 feet long. East breakwater is 750 feet long, and during next summer will be extended 300 feet in a southwesterly direction, the riprap embankment being already in place under water. Vessels should keep 300 feet away from the outer end of the East breakwater. Vessels can remain in harbor during severe storms.—Charts: Lake Superior, No. 3; Lake Superior; Agate and Burlington Bays."

Mr. Houpt: Exhibits "B" and "C" have been already introduced in evidence.

Exhibit "E" is a blue print map, which was excluded, except for the purpose of using it on argument to the jury.

Government Rests.

158 Mr. Spencer: At this time we renew the motion that the Court dismiss the case for the same reasons as given in the other case, which are that the evidence shows such contributory negligence on the part of the Government in substituting a white light for a proper light at the outer end of the pier, and in failing to give proper notice of the same, as would bar a recovery.

The Court: I do not think you need argue the motion at this time. The motion will be denied.

Counsel for defendant excepts to the ruling of the Court.

Mr. Kremer: The first witness whose deposition we will read is that of John McAvoy, whose testimony was taken upon a former trial.

John McAvoy, being sworn on the part of the defendant, testifies as follows:

Q. What is your full name? A. John McAvoy.
Q. Where do you live? A. Chicago.
Q. What is your business? A. Mariner.
Q. How long have you been a mariner? A. Over thirty years.
Q. Where have you sailed? A. On the chain of lakes.
Q. In what capacities? A. From boy to master.
Q. In what kind of ships? A Sailing and steamers.
Q. On the night of the 24th of July, 1901, what ship were you on? A. The Sheandoah.
Q. In what capacity? A. Master.

159 Q. What is the tonnage of that ship? A. About 1800 tons.

Q. Where on that night was she, say at six or seven o'clock in the evening? A. Superior Harbor.

Q. What was she loaded with? A. Iron ore.

Q. How many tons? A. About 3200.

Q. Where was she bound? A. She was bound, I think it was to Cleveland.

Q. Was she to call at any port before reaching Cleveland, between Superior and Cleveland? A. Yes, sir.

Q. Where? A. Two Harbors.

Q. What for? A. To pick up the Schooner Paisley.

Q. What was she going there for? A. To take her down to Erie.

Q. Where was this schooner lying? A. She was lying at the lumber dock, the merchandise dock.

Q. At Two Harbors? A. Yes, sir. At Two Harbors.

Q. What was the weather when you left Superior? A. The weather was cloudy, and the wind northeast.

Q. What was the force of the wind, what kind of a sea did you have? A. We had had quite a sea outside. It was blowing pretty hard from the northeast.

Q. What speed did you make going over there? A. Part of the time we were making nine miles an hour, and part of the time less.

Q. What was your course? A. Somewhere about northeast, half east, northeast by east.

Q. About what time did you arrive off Two Harbors? A. About eleven o'clock.

160 Q. What was the weather then? A. It was blowing very hard from the northeast, and dark and cloudy.

Q. What was your course prior to entering the harbor, what did you do? A. Well, I steered on down the lake until about abreast of Two Harbors, probably northeast by east.

Q. Then what did you do? A. Well, I went about after I got down far enough to suit me, and then I headed her for the harbor.

Q. What did you do then with your engine? A. When I turned round for the harbor I checked down.

Q. How far away were you when you checked down? A. Probably about three miles, between three and four miles, I should judge. Somewhere along there.

Q. What was your speed after you checked down? A. About four miles an hour.

Q. Who was there on deck forward, besides yourself? A. The mate and the lookout.

Q. What lights did you see as you approached Two Harbors? A. I saw the Two Harbor light first.

Q. What is that? A. That is a bright light at the point.

Q. Is that on the land, or at the end of the pier? A. On the land.

Q. What next? A. Then I saw the lights at Two Harbors, on the dock; they showed up next.

Q. What next? A. Then the pier light showed up, the breakwater with a red light on it.

161 Q. What color was that did you say? A. Red.

Q. As you got nearer what next? A. I could designate a bright light right off the end of the pier.

Q. In about what direction from the breakwater? What was its color? A. It was off probably about southwest from the breakwater; a bright light.

Q. Was it in a line along a range between the red light of the breakwater and the bright light on the shore? A. No, sir, it was not.

Q. It was not? A. No, sir.

Q. What kind of a light was it? A. It was a bright lantern.

Q. About how high was it above the water? [Q.] Well, I thought then it was about twenty feet above the water. Somewhere along there. A bright light.

Q. At that time what notice or knowledge had you of the building of an addition to the breakwater at Two Harbors? A. I had no knowledge whatever, that I remember of, at the time or since.

Q. In going over from Superior to Two Harbors, did you consult any publication with a view of learning what the lights at Two Harbors were? A. I always kept a book on my desk, or a book along with the others; and I looked at it that evening going over there.

Q. Look at that book, is that a book like the one you used? A. Yes, sir.

The Court: What exhibit is that?

162 Mr. Kremer: Defendant's Exhibit "1".

Q. Will you turn to the page, and give the page on which you had the information relating to the Two Harbors lights. A. Page 82.

Q. What is it that you found there? A. I found that Two Harbors had a red light on the break-water. Two Harbors is a fixed white light.

Q. Is there anything in that book indicating any other lights than a white light on the shore, and a red light on the breakwater? A. No, sir.

Q. Did you or did you not have that information that night before you went there? A. Yes, sir, I did.

Q. State how generally these books are used by mariners navigating the lakes as to the matter of its condition relating to lights and fog signals; as to whether they are used very frequently. A. They are frequently; in foggy weather very frequently. It is very hard for the master of a vessel to remember the length of the fog signals; the length of the blasts, and the interval between them.

Q. So you use this book frequently? A. Yes, sir, these books are always kept handy, so as to be able to look at the book and find the fog signals and the interval between the blasts and also to look at the lights.

Q. Before this night when had you been at Two Harbors? A. It was the season before.

Q. Prior to that time had you seen either of these pamphlets [markes] Exhibit "B" or Exhibit "C" that have been
163 offered in evidence here? A. To the best of my knowledge I had never seen either of those books.

Q. Did you ever receive them or similar ones? A. I have received notices, yes, sir.

Q. Did you receive copies of these Exhibits? A. Not that I remember. Not to my knowledge. I have never received a copy of those.

Q. Did you know that you could go to the engineer's office and get bulletins that related to the obstructions of navigation? A. No, sir, I did not.

Q. Did you ever hear of anybody going there for such information? A. No, sir.

Q. How far away were you from this new work that you finally collided with, when you saw it first? A. Well, to the best of my knowledge the timber was about 200 feet away at that time.

Q. Where were you standing at that time? A. I was on the pilot house.

Q. How far were you from this bell that rings in the engine room? A. Right at my hand. It was right alongside of me.

Q. What did you do the first thing? A. The first thing I saw the breakers, and I rang the bells to reverse the engine.

Q. What do you mean by breakers? A. Where the water breaks over a pier or anything of that kind, it makes what we call breakers.

164 Q. That is, it means a wave? A. Yes, sir.

Q. You say you rang to reverse the engine? A. Yes, sir.

Q. What signal did you give to the engineer? A. I gave two strokes.

Q. What kind of a signal is that? A. When going ahead he is supposed to back her strong, back her immediately, reverse the engine and back her at once.

Q. Was that signal acted upon? A. Yes, sir.

Q. Did she lose headway? A. Yes, sir, she lost headway.

Q. How much ahead did she go when she struck, how fast was she going when she struck? A. About I should judge, a mile and a half or a mile and three quarters an hour when she struck.

Q. Can you approximate the weight of your ship, in addition to her cargo? A. Do you mean with the cargo?

Q. Without the cargo, or say the whole thing, cargo and everything. A. I should judge seven or eight thousand tons.

Q. The vessel would be seven or eight hundred tons, and how much for the cargo? A. The whole thing would be seven or eight thousand tons.

Q. What part of the vessel struck this break-water? A. Her stem.

Q. Did it damage the vessel any? A. Not that I could see.

Q. After she struck what did you do? A. I backed out. She backed out, she kept on backing out, she slid right into the rock work. I went into the harbor. I could see the breakers then as far as they went by the bright light in the harbor.

Q. Did you have any idea at that time, and if so what, as to what the bright light marked? A. I thought it was a schooner or something or a barge that had been towed in there and dropped anchor, and had dragged her anchor.

Q. What kind of a vessel do you mean? A. I mean I thought it was a schooner or a barge.

Q. Tell about the custom as to barges going in there to anchor, or being dropped there; tell us about that, how is that done? A. Well, they generally with a northeast wind blowing, they round the breakwater when they cast off the tow line from the steamer. Some go ahead as far as they can. If they can't make the dock they let go anchor there, they generally carry their anchor on the rail ready to drop it. Sometimes they can get up to the ore dock, but it is very seldom that they can make the ore dock.

Q. What vessels are these? A. Barges and schooners.

Q. How long are the tow lines that they run in there with? A. They are probably 300 feet when they are being towed; but they have to shorten them up before they can get in.

Q. In what shape is a barge, or what does a barge do in letting go the anchor? A. Well, when there is no dock to take her to, some of them as I have said have the anchor on the rail, and when they get ready they let it go. Some of them have patent anchors, when they just raise the compressor, and let it run down to the bottom.

166 Q. When a vessel comes to anchor what lights does she show, and when she is under way what lights does she carry? A. What lights does she show?

Q. Yes, when she is under way what lights does she show? A. A red light and a green light.

Q. And when they are lying at anchor what light do they show? A. A bright light. That is, they hang a bright light in the rigging.

Q. Had you ever known vessels to come to anchor there that way? A. Yes, sir.

Q. What did you say as to a vessel being dropped? A. As the steamer comes inside they often drop their tow.

Q. State whether or not you have known times when they have dragged anchor out of the harbor there, near the pier? A. I see one while we lay there this time when I had the collision.

Q. Tell us about that. A. Well, a boat was brought in, and the steamer let her go a little inside the breakwater; and before the tug got to her she dragged down abreast with the breakwater, outside of it, probably about 400 feet.

Q. Out in the lake? A. Yes, sir. Outside on the west breakwater.

Q. What other vessels besides ore carriers come into that port? A. There are a great many boats go there with coal that do not load there. And there are a great many boats that load lumber there.

167 Q. These lumber vessels, about what is the size of them? A. There is a great many of these ordinary canal size steamers, from 140 feet and from that up.

Q. And how about the barges? A. The barges are some of them less.

Q. What do you say as to a red light for the purpose of marking an obstruction at a pier of that kind, as a signal; as to whether it is a good or a poor, or a worse signal than a white light?

Mr. Houpt: I object to the question, as calling for the conclusion of the witness.

The Court: The objection is sustained.

Counsel for defendant excepts to the ruling.

Q. Have you ever known of a red light being used to mark a submerged obstruction to navigation? A. Yes, sir.

Q. Do you know whether a white light is ever used for that purpose? Have you ever noticed them? A. I have seen that used on Lake Superior, and I have seen that used at Duluth harbor, and that one I saw used at that time at Two Harbors.

Q. Suppose you had seen a red light when you saw this white light, what would it have indicated to you or any mariner in that vicinity? A. It would indicate that there was something wrong there.

Q. How would you have distinguished that red light from the red light of a vessel? A. Well, I wouldn't expect to see any schooner sailing out of Two Harbors.

168 Q. Red light [along] would be found on what kind of a vessel? A. On a sailing vessel.

Q. State whether she would be still or moving? A. She would be under way.

Q. Will you look at this paper I hand you now, and state whether that is one of the notices to mariners that is sent out by the Government? A. Yes, sir.

Mr. Kremer: I offer this paper in evidence at this time.

Mr. Houpt: I object to it as immaterial, incompetent and irrelevant, for the reason that it has reference to a different location than the one in question.

Mr. Kremer: The purpose of this is to show that red lights are used on temporary structures.

The Court: The objection is sustained.

Mr. Kremer: If we can show that they were used before this accident.

The Court: That might be different.

Said paper is marked Defendant's Exhibit 2. The portion referred to by counsel for defendant is as follows:

"Lake Erie. Port Colbourne. Change in color of temporary light. A temporary light is maintained by the contractors on the outer end of the new breakwater now under construction at Port Colbourne. This light has been a fixed white light, but on July 20th, 1902, it was changed in color to red. No further particulars respecting its location and character have been received."

169 Cross-Examination.

Mr. Houpt:

Q. How often have you been in and out of Two Harbors? A. I have been in there quite a number of times.

Q. How many times do you think? A. It would be pretty hard to say how many times.

Q. You have been in and out a good many times, have you not? A. Yes, sir, I have.

Q. You were perfectly familiar with that red light at the east end of the easterly breakwater? A. Yes, sir. I have seen that often.

Q. For a good many years? A. Yes, sir.

Q. They have always maintained that light for how many years? A. I don't know how long. It was maintained there for quite awhile, I know.

Q. A good many years? A. Yes, sir.

Q. You understand all about these rules, that the lighthouse board prescribes lights upon completed structures? A. Yes, sir. I suppose the lighthouse board does.

Q. The lighthouse board has no supervision or control over work in the course of construction? A. I didn't know that before. I understood it is so now here.

Q. You didn't know that before? A. No, sir, I didn't. I know it though now.

Q. What time were you in that harbor in 1900? A. Some time in the fore part of the season. I don't know exactly what time it was.

170 Q. Can't you give the month? A. I am not sure whether it was the first trip I made, or the second. If it was the first trip I made, it would be along in the latter part of April; if it was the second trip it was along in the latter part of May. I would not be positive which one it was, I was in there.

Q. Don't you remember that when you visited that harbor in 1900, there was work being done? A. No, sir.

Q. In connection with this breakwater? A. No, sir.

Q. You didn't observe that? A. I went right in in the evening and went close around the red light, and went right on to the dock, to Dock No. 1.

Q. You went close to the red light that night, and you don't know whether there was work being done or not? A. No, sir.

Q. You didn't notice any submarine work being done? A. No, sir.

Q. You made no inquiries at that time concerning the condition of the harbor, or as to what was to be done in the future? A. No, sir.

Q. You did not? A. No, sir, there was a boat went in ahead of me that night; and I followed them in, and dropped right at No. One dock.

Q. You followed them in and went to No. One dock? A. Yes, sir, and loaded.

Q. You said you didn't make any inquiries relative to getting any information concerning any changes that were contemplated there? A. No, sir, I did not. It was not necessary to do so at the time.

171 Q. You can just answer my question. A. No, sir, I did not.

Q. Then you were in there in April or May, 1900? A. Yes, sir.

Q. Where did you sail the balance of that year? A. Between Duluth and Lake Erie ports, and Ashland.

Q. What was your regular trip, what was the regular trip of the Shenandoah? A. I had no regular trip.

Q. You had no regular trip? A. No, sir.

Q. How many times did you pass Detroit that year? I mean the year 1900? Oh! about. A. I don't know. I think I made 11 trips, 11 or 12 trips; 11 trips.

Q. Through the straights of Detroit? A. I made eleven round trips.

Q. During the year 1900? A. Yes, sir.

Q. When mail is delivered for you on board ship, is it delivered to you personally, or is it just brought to the vessel? A. It is brought to the vessel. There is always a man there to take it. And then it is delivered to me.

Q. It is delivered to a man on board the vessel whose duty it is to receive the mail? A. Yes, sir.

Q. And this man then distributes it, does he? A. He delivers it to me.

Q. He distributes it to the proper parties? A. He delivers it to me.

Q. He delivers it all to you? A. Yes, sir. He delivers it all to me.

Q. Did you get any bulletins in the year 1900? A. Yes, sir.

172 Q. Did you get any of the Notices to Mariners? A. Yes, sir, I received some.

Q. Do you remember what ones you received? A. No, sir, I don't remember now.

Q. You cannot now mention any particular ones that you received? A. No, sir, I cannot.

Q. Can you tell how many you received? A. No, sir.

Q. Can you tell what harbors the ones that you did receive related to? A. No, sir, not now. I can not.

Q. Did you examine those that you did receive? A. I examined the whole of them.

Q. Did you make a very particular examination of them? A. Yes, sir.

Q. And yet you are unable to state now any particular port or any particular harbor to which they may have related? A. Yes, sir. I can not state now.

Q. And you are unable to give any information that was contained in any of these notices or papers, and you are unable to make any statement as to any information that was contained in any of them? A. I don't know but I could state some.

Q Well, which ones? A. I think there was one in particular about Devil's Island, down here.

Q. What is that? A. Devil's Island light.

Q. Where is that? A. On Lake Superior.

Q. What was said concerning Devil's Island light? A. That there was to be a change of light there.

173 Q. You remember that? A. Yes, sir. I remember that one all right, I remember it now.

Q. You received that number did you? A. Yes, sir, I received quite a number of them.

Q. About how often did they come along, about every week? A. No, sir, not every week. There was not a report every week.

Q. But would you get some every time you passed through there? A. Pretty much.

Q. Pretty much every time? A. Yes, sir.

Q. Each time you went there? A. Yes, sir, pretty much every time, going one way or the other.

Q. You always had these all right in the boat? A. Yes, sir, I always had them.

Q. Did you note upon your lighthouse book any changes that were contained in these notices to mariners that were received by you? A. No, sir.

Q. Where did you sail from to Superior? A. To Superior?

Q. Yes, what port, did you sail from to Superior that time? A. I don't remember where I came from.

Q. How long were you at Superior? Don't you remember where you came from? A. No, sir, I don't.

Q. Well, how long were you at Superior that time? A. I think I was over there in Superior, about, I wouldn't be positive whether I went there in the morning or in the evening to the dock.

Q. You don't remember whether you went there in
174 morning or in the evening to the dock? A. No, sir, I wouldn't be positive whether I went there in the evening or late at night, or whether I went there in the morning.

Q. When did you first learn that you were to go to Two Harbors? A. That day while loading.

Q. That day while you were loading? A. Yes, sir.

Q. You loaded at Superior, did you? A. Yes, sir.

Q. Then you must have gone there in the morning, must you not? A. No, sir, not necessarily. I wouldn't be positive about going there in the morning.

Q. Did you load there nights, as well as day time? A. Yes, sir.

Q. It was at Superior when you first learned that you were to go to Two Harbors? A. Yes, sir. Over at Allouez Bay.

Q. That is Superior, isn't it? A. Yes, sir.

Q. After receiving these orders, your orders to put into Two Harbors, did you make any inquiry of any person as to the condition of the harbor at Two Harbors? A. No, sir.

Q. Did you ever do that as a sailor? A. Make inquiries, make any inquiries about it?

Q. Yes, did you ever make any inquiries as to the harbor, as to any harbor you were about to enter, that you had not entered for a year or more? A. Well, yes, I have.

Q. You have done that? A. Yes, sir, some place that I was not familiar with.

175 Q. Isn't that a common practice among mariners? A. I don't know at all that it is. I have never had any one ask me about anything [if] that kind.

Q. Does the Davidson S. S. Company have quite a large number of vessels? A. Yes, sir.

Q. About how many? A. I don't know.

Mr. Kremer: I object to this as immaterial.

The Court: The witness says he does not know.

Q. If you had received the information contained in these various government exhibits here, Mr. McAvoy, do you think that you would have run into the breakwater that night? A. I don't know but what I would, sir.

Q. You would have known then at least, that you should have gone 300 feet further out from shore? A. Yes, sir, I would have known that.

Q. Don't you think you would have known the difference between 750 and 1050 feet? A. No, sir, I don't know as I would.

Q. You think you wouldn't have known that? A. No, sir.

Q. Why do you think you would have run into it, if you had received this information, captain? A. Well, if the light was not there, the night was terrible dark, and the wind was blowing very hard; and it was pretty hard for a man to tell the distance, and to judge within a couple of hundred or three hundred feet at such a time. I might have got three hundred feet short there, as we have to go around very close.

Q. For instance, f you had been familiar with this
176 chart Exhibit No. 1, you would have known that the red light there was not the end of the breakwater, would you not? A. Yes, sir.

Q. And then you would have known that you would have to go 300 feet beyond that, would you not? A. Yes, sir.

Q. If you had been familiar with that Chart Exhibit "A"? A. Yes, sir.

Q. Then you would not have run into the breakwater, would you? A. Well, I don't know as I would.

Q. Now, you say, Captain, that while you were in the harbor the next day, you noticed a boat just in here, beyond the west breakwater? A. Yes, sir.

Q. Where did the boat come from, from what point? A. Right here, somewhere in the middle of the bay.

Q. Right over from the east shore? A. Right here, somewhere there between this point around here.

The Court: About where?

Witness: About in here (Showing on map.)

Q. About haw many feet would that be north of the new breakwater? A. As near as I can judge it is probably fourteen or fifteen hundred feet across here, or a thousand feet, about that.

Q. Then this would be something like three or four hundred feet? A. Something like five hundred feet.

Q. Was the wind blowing in the same direction the next day as it was the night you entered the harbor? A. Yes, sir.

Q. It was? A. Yes, sir.

177 Q. Blowing in the same direction? A. Yes, sir.

Q. You say you are familiar with that harbor, and you know that boats anchor in that harbor? A. Yes, sir.

Q. Was that a usual place for boats to anchor in that harbor? A. I have seen them come in and let go here. It depends on the steamer and length of the tow line. They have signalled them to let go here until the tug could pick them up.

Q. That is they would anchor as well as they could right in here near the east shore? A. Anchor right here in the center wherever they could; if they couldn't get in wherever they could let go.

Q. Near the east shore? A. No, sir. I mean they haven't always got time to choose a place. He will let go, he has got to let go wherever he can sometime. They have to save time. These boats were busy boats and they have to go whenever they can go.

Q. I am talking about ordinary boats going in there where they would anchor? A. I don't know. I saw the boat there the next day. She may have been in the very center of the bay, there is good anchorage in the very center of the bay.

Q. That is, when a boat enters the harbor, is she picked up by a tug? A. If the tug is at liberty.

Q. And the tug places the boat in the proper place? A. Places her at the ore docks.

178 Q. Or if the boat is going to anchor for the night, does the tug place the boat in position? A. No, sir, I have never seen any boats anchored over night.

Q. You have never seen any boat anchored there over night? A. No, sir, not over night.

Q. Did you ever see a boat anchored outside the breakwater at 11 or 12 o'clock at night? A. No, sir.

Q. It was a very unusual sight to see vessels outside the harbor? A. No, sir.

Q. At anchor? A. No, sir.

Q. It was not? A. No, sir.

Q. Did you ever see one before anchored outside the harbor? A. No, sir, not at night.

Q. Not at night? A. No, sir.

Q. Now then, Captain, on what theory, considering the place where boats would anchor, and the course of the wind that night, on what theory would you think that a boat would drag its anchor down to a point at the end of that breakwater? A. It would be pretty hard for me to answer your question, without saying a good deal.

Q. The wind would have to be blowing from the north? A. No, sir, not necessarily. A boat don't always drag straight.

Q. It drags in the direction of the wind, does it not? A. No, sir, not always.

Q. If it is left free? A. No, sir, it does not.

Q. What is the reason that it does not? A. I can't explain that exactly, I can't say why it is. But she will
179 start off head first and then she will turn. If she is heading that way she will be likely to drift out this way.

Q. You would not however, ordinarily expect from the direction the wind was blowing, that the boat would drift from the direction the wind was blowing, that the boat would drift as you say the other way, out here, past the west breakwater? A. Well, it is pretty hard for me to tell that night what range a boat would take. But the boat was over at the end of the breakwater that night.

Q. As a sailor, what do you depend on for information concerning the changes in harbors? A. Do you say concerning a change in the harbor?

Q. Yes, what information do you depend on? A. Well, I most generally depend on observation, and what I hear from others, other masters that have been in the harbor ahead of me.

Q. You pay no attention whatever to the bulletins when they come in? A. Very little.

Q. Very little? A. Yes, sir.

Q. And you don't always get information from the masters of other vessels, as was the case in your entering the harbor of Two Harbors that night? A. Oh, yes, sir, I have often got information at different places.

Q. Have you ever seen in any of the harbors on Lake Superior any Government work in the course of construction? A. I have seen this work here at Duluth.

180 Q. And in any other harbor? A. No, sir.

Q. This is the only one, this one here at Duluth? A. This one here in Duluth, yes, sir.

Q. I believe you said here in Duluth, all the lights you saw were white lights? A. Yes, sir, all that I noticed were white lights.

Q. Then here in Duluth is the only place where you have ever seen in the night time any of the Government work in the course of construction? A. No, I didn't say this was the only place where I had seen government work.

Q. On Lake Superior? A. Yes, sir, on Lake Superior.

Q. Have you in the day time? Have you in any of these harbors on Lake Superior, seen them in the day time? A. Yes, sir, I have seen them at Portage.

Q. Sir? A. I have seen Government work going on at Portage.

Q. Is that the only one? A. Yes, sir.

Redirect Examination

Read by Mr. Kremer:

Q. Captain, is there anything to mark that light, any light to mark the shore at the end of the old breakwater? A. At Two Harbors, do you mean?

Q. Yes. A. No, sir.

Q. How would you get at the length of the pier there in the darkness? A. All you have got to go by is that red light.

Q. Is there any light on the west end of the pier? A.
181 Not that I know of.

Q. Isn't it a fact that in most harbors there is only a light on one pier?

Mr. Houpt: I object to this as immaterial.

The Court: Yes, I think that is immaterial.

Q. Where there is only one light and there are two piers, which light do you keep nearest to, which pier do you keep nearest to? A. Keep nearest the pier that the light is on.

Mr. Kremer: I will now read in evidence the testimony of Robert Gaskell, who was also a witness sworn for defendant, on a former trial, and testified as follows:

Mr. Kremer:

Q. What is your name? A. Robert Gaskell.

Q. Where do you live? A. Buffalo.

Q. What is your occupation? A. Mariner.

Q. How long have you been a mariner? A. About ten years.

Q. Where? A. On the Great Lakes.

Q. In what capacity have you sailed? A. Well, very near all of them up to mate.

Q. How long have you been a licensed officer? A.
182 Four years.

Q. On July 24th, 1901, what ship were you on? A. The steamer Shenandoah.

Q. In what capacity? A. Second mate.

Q. What was the weather that night, as you went over from Superior to Two Harbors? A. Well, it was blowing pretty hard that night.

Q. From where? A. Northeast. It was cloudy.

Q. How was the sea? A. There was a big sea.

Q. How was it as to being light or dark that night? A. It was a very dark night.

Q. About what time did you get over to Two Harbors? A. It was somewhere round eleven o'clock.

Q. What was the night there then? A. Very dark.

Q. What was the first thing you made out of the lights at Two Harbors? A. Well, I seen the lights on the ore docks. The light at the end of the point there, the Two Harbors main light.

Q. What colored light is that? A. A bright light.

Q. What is the light on? A. It is on the point of the east breakwater.

Q. Is that a red or a white light? A. A white light.

Q. What light did you see next? A. The lights of the ore docks.

Q. Then what lights did you see? A. I seen the red light on the breakwater.

Q. What do you say as to what distance you could see that breakwater? A. See the breakwater light?

183 Q. Yes. A. Oh, I think I could see that light seven or eight miles, I should judge.

Q. How far could you see the breakwater itself? A. I couldn't tell the distance. We was almost on top of it when I saw it.

Q. Where were you at the time the steamer approached the harbor? A. I stood forward.

Q. In a general way, at what rate of speed were you going as you approached, when you were within two miles? A. We were going somewhere round four miles an hour.

Q. Was that full speed or checked speed? A. Checked speed. About half.

Q. Did you see any other lights there besides the red light? A. A white light.

Q. And a harbor light? A. I seen a bright light there.

Q. Where was the bright light with reference to the red light? A. It was further to the west.

Q. About what distance, would you estimate? A. I thought that night, it was probably four or five hundred feet, probably it was.

Mr. Houpt: I move to strike out what the witness thought.

The Court: It is his judgment.

Witness: That is my judgment, about four or five hundred feet.

Q. Have you anything by which you can tell the distance at night on the water accurately? A. Not going towards
184 a light like that, no, sir.

Q. About how high did that bright light seem to be? A. I judged it to be about twenty feet; if I remember right.

Q. Did you recognize what that red light was? A. Yes, sir, why, yes. I knew what the red light was.

Q. What did you suppose the white light was, in your opinion? A. I supposed, my opinion was that it was a boat at anchor.

Q. You mean you thought it was a boat at anchor? A. Yes, sir. That is the sort of a light they always carry.

Q. Does a boat at anchor carry any other lights? A. No, sir.

Q. Had you ever been in Two Harbors, before? A. Yes, sir, I had been in there several times.

Q. What do you know about vessels coming to anchor there, at the point where you say you thought there was a boat at anchor, where you saw the white light? A. I have seen vessels anchored there. I have seen steamers come in there with a barge and drop it, and immediately they would go up to the pier, leaving the barge there for the tug to take care of.

Q. Did you ever see them let go their anchors there? A. Yes, sir, I have.

Q. When they let go their anchors what did they do with their under-way lights? A. The first thing they do when they let go anchor is to have the lights down and put up the anchor lights.

Q. Does it make any difference how long you are go-
185 ing to stay at anchor? A. No, sir. You are supposed to have them up if you are only going to anchor for five minutes.

Q. When did you first discover this new work, these cribs? A. When I was starting for the bow, and I heard the captain give the signal to back up by the bells; and just about the time he gave them I seen the white wash.

Q. What do you mean by the white wash, what is that caused by? A. The sea would break over this place and make a kind of a white breaker.

Q. You say the captain gave the signal for the engine to back? A. Yes, sir; he gave the signal for the engine to back strong.

Q. About what was the headway for the steamer when she struck? A. From the distance she had to back up. I should think it was not over a mile an hour. Not over a mile an hour.

Q. How did the steamer enter there with reference to the red light, as to whether she went at the usual distance, or otherwise? A. I don't understand the question.

Q. Did she enter the port with reference to the red light as it is usual that steamers entered it, or did she go further way in, or nearer to it? A. We ran up the harbor in the first instance to go in there, and in going in there we kept the light upon the starboard bow, just about the same distance as we always went in there.

Q. Do you know about the bulletins that are sent out and labelled, Notice to Mariners, have you ever seen them, as an officer? A. Yes, sir. I have read them all; all that I have seen.

Q. Did you ever hear of a master or officer of a
186 steamer applying to the engineer's office for printed information upon the subject of obstructions to navigation, or guides to navigation? A. No, sir, I never did. I never heard of that.

Q. Did you ever do it yourself? A. No, sir.

Q. What do you say as to supposing that this light was on a vessel at anchor, as you said? A. Well, I said I thought it was a vessel at anchor.

Q. What would you say as to whether you would be likely to foul her chain on the anchor? A. No, sir, we would never foul her chain, coming in at that distance.

Q. Why not? A. Her chain wouldn't lead that way; it wouldn't lead that far.

Q. How much is usually used when you let go in a hurry at a place like that? A. Not any more than what would hold her.

Q. What is that? A. Not any more than will hold her.

Q. Isn't it a fact that with an ordinary anchor you let go one shot of chain only? A. Yes, sir.

Q. About how many fathoms is that? A. Some shots are fifteen fathoms, and I have known some shots to be twenty five fathoms.

Q. And a fathom is how much? A. Six feet.

Q. And when you have got a patent anchor you simply let it run out until you get ready to stop it, isn't that the way they do? A. I don't understand you.

Q. When they have got a patent anchor they don't let go a certain quantity as they do with the ordinary anchor, but they let go until they have enough, and then they stop it?
187 Isn't that the way it is done? A. Yes, sir.

Q. And with the other anchor, they have a certain quantity of chain overhauled, ready to let go? A. Yes, sir.

Q. And then if they want any more, they have to overhaul some more? A. Yes, sir, on some boats they do.

Q. Have you ever noticed the lights on obstructions or on new work where it is being done by the Government, as to the color of the light? A. Yes, sir.

Q. What lights have you seen set to mark these places? A. We had a bright light at Two Harbors; and I have seen them with red lights at Buffalo.

Q. On the breakwater? A. Yes, sir. On the breakwater at Buffalo.

Q. Did you ever look or make an examination for the purpose of determining what kind of lights are used on most of the work, at breakwaters or piers? A. Well, red lights, I have—

Mr. Houpt: I object to this question, as to where he would look, he might look and not observe it.

The Court: I don't see how it makes any difference.

Mr. Houpt: I think that the stipulation made this morning covers this question; that a great many of the lights were white lights.

Mr. Kremer: This witness can tell us just what the proposition is; and then we would know better than we can by the terms of the stipulation, and it will not conflict with it.

Mr. Houpt: I object to it as hearsay evidence. It is
188 incompetent, and if he acquired this information from any report because the report is the best evidence.

Mr. Kremer: He does get it from the record.

The Court: If the record is here he may answer.

Witness: There are a great many more red. There are four times as many red as there are white on the lakes.

The Court: What does that relate to?

Witness: All breakwaters and piers.

The Court: That is, completed breakwaters and piers? That is breakwaters or piers in the process of construction?

Witness: No, sir. That is completed.

Q. What do you say as to the rate of speed at which this vessel was approaching the harbor before the breakwater was discovered; as to whether that is good seamanship? A. Oh, yes; that is good.

Q. That is a moderate speed? A. Yes, sir. That is a moderate speed.

Cross-Examination

Mr. Smith, reads to the jury:

Q. To whom did you express the opinion that night, that you thought that the white light was a ship at anchor? A. To the watchman who was at the bow with me at the time; and I expressed it to the captain too that night.

Q. What are the duties of a second mate on board a steamer? A. Well, they have several duties to do. They have got to look after all the work that is done on the boat, look after it, and see who is doing it; and they are authorized to stand
189 watch.

Q. Has the second mate any special position? A. Yes, sir.

Q. What is his position? A. His position is forward.

Q. The position of the second mate is forward? A. Yes, sir.

Q. I believe you stated that you were second mate on the boat? A. Yes, sir. I was second mate on the boat.

Q. And the position of the second mate is forward on the boat? A. Yes, sir. It is when the boat is running. When she is laid up at the dock or landing at a dock his position is at the end of the boat where she is moving in making the landing.

Q. You and the watchman were forward that night? A. Yes, sir.

Q. How often have you been in Two Harbors? A. Oh, I should judge I have been in there about ten times.

Q. Ten times? A. Yes, sir.

Q. How many times did you enter that harbor in 1900? A. In 1900?

Q. Yes. A. I was in there once.

Q. What time was that. A. In the spring.

Q. What time in the spring? A. The fore part of the spring.

Q. What month? A. It was along in April, I think. Yes, I think it was in April.

Q. You know it was in April? A. Yes.

Q. How many times were you in there in 1899? A. 1899?

Q. Yes. A. I don't think I was in there at all in 1899.

Q. You don't think you were in there at all in 1899? A. No, sir, not in 1899. I wouldn't be positive; it is quite a long way back to 1899.

190 Q. But you have no recollection of being there in 1899? A. No, sir. I have no recollection of being there in 1899.

Q. Did you ever notice any work under process of construction in that harbor? A. No, sir, I never did.

Q. You didn't notice any? A. No, sir.

Q. Have you ever seen any work in process of construction? A. Yes, sir, I have.

Q. In the way of piers and breakwaters? A. Yes, sir.

Q. In harbors or ports on Lake Superior? A. I have seen them at Duluth here, and when we went into Two Harbors.

Q. That is all, is it? A. That is all, sir.

Q. In both instances a white light was used and placed upon this new work, was it not? A. They had a white light at Two Harbors and they had a bright light at Duluth.

Q. These are the only two instances you know of? A. I have been through the Portage at day time, but never at night.

Q. You were never there at night? A. No, sir.

Q. You have nothing to do with navigating the boat? A. Why, yes, I have as a watch.

Q. You have as a watch? A. Yes, sir.

Q. But the management and control of the boat is entirely under the captain? A. Yes, sir, or the master.

Q. He is the responsible party? A. He is the head man.

Q. Where were you stationed in the boat when you entered Duluth harbor? A. Duluth.

191 Q. Superior? A. I would be forward sometimes and sometimes I would be aft.

Q. Where were you at the time when you entered the harbor of Superior? A. Going into Superior before we went to Two Harbors, do you mean?

Q. Yes. A. That is too long ago; I couldn't tell you that.

Mr. Kremer: I object to it as immaterial.

Q. Where did you sail from when you went to Superior?

Mr. Kremer: I object to the question as entirely immaterial in this case.

The Court: I think I will allow the question.

Q. From what port did you sail from when you went to Superior? A. I don't just remember.

Q. You can't remember that? A. No, sir, I can't remember where we came from when we went in there.

Q. How long had you been at sea before you entered the port of Superior? A. That is too long ago I can't remember. All these incidents you want to know about as to where we were four or five years ago I can't remember.

Mr. Houpt: I want to find out what you can remember; that's all.

Redirect Examination

Examined by Mr. Kremer on the former trial, is read by Mr. Smith for the defendant.

Q. Did you know about this new work that was going on at Two Harbors that night, before you got there? A. No,
192 sir, I did not.

Q. Had you heard anything about it? A. No, sir; never heard a word about it.

Q. Had you heard anything about that bright light upon that end of the breakwater? A. No, sir, I never did.

193 Frank Henrich, a witness produced and sworn on the part of the defendant, testifies as follows:

Examination-in-Chief

By Mr. Kremer.

Q. What is your full name? A. Frank Henrich.

Q. Where do you live? A. Duluth.

Q. What is your occupation? A. Nautical expert in the Hydrographic Office.

Q. What is the Hydrographic Office? A. It is a bureau to furnish all information of importance to seamen and others interested in shipping.

Q. By whom is it maintained? A. By the United States navigation department.

Q. Who is your immediate superior officer in Duluth? A. I am in charge of the office.

Q. You are in charge of the office here? A. Yes, sir.

Q. To whom do you report the doings of your office? A. To the Hydrographer of the United States, Washington.

Q. Do you know what department of the Government has charge of the construction of breakwaters and piers? A. The weather department.

Q. And what department of the Government has charge of light houses and the lights? A. The department of Commerce and Labor.

Q. In 1891 what department had charge of those
194 matters? A. The Treasury Department.

Q. What is your duty and what was your duty in 1901 as officer in charge of the Hydrographic at Duluth? A. My usual duties are to report all changes in lights or constructions, and anything that concerns navigation, warning them of any new disposition of the lights, and distributing that information punctually as soon as received.

Q. Have you any duty with furnishing information as to obstructions to navigation and changes of lights? A. Yes, sir, we report them.

Q. To whom? A. To Washington.

Q. How do you circulate and publish that information? A. The information is first revised at Washington and then it is printed and transmitted to us in pamphlet form called, Notices to Mariners.

Q. Then what do you do with these Notices to Mariners? A. We mail them to masters and owners, and others interested in shipping.

Q. When did you first learn of the steamer Shenandoah striking the breakwater at Two Harbors? A. The day after she struck.

Q. How did you get that information? A. Through the newspapers.

Q. What information did you have before that of the construction of the break water or cribs and the exhibition of a white light on the end of that breakwater prior to that time?

195 A. I had information relating to the construction of the breakwater, but not as to the light, I had no information as to a light.

Q. What information had you that the cribs had actually been sunk, prior to the accident? A. I knew that the extension of the breakwater was under construction.

Q. What notice if any was sent out by the Hydrographic office of the United States of the construction and actual existence of the cribs, and the exhibition of a white light, prior to July 24th? A. There was a notice to mariners issued in 1899 and one in 1900 relating to the construction of the breakwater. There was none issued relating to a light.

Q. Were any notices to mariners published or sent out after the notice to mariners of the date of August 11th 1900, which is known here as Exhibit B. A. Not before the collision, not before the accident.

Q. Not before the accident? A. No, sir.

Q. When did you receive the first official communication in relation to the construction and the actual existence of the extension, and of a white light marking it? A. In September 1901.

Q. And from what source did you get that information? A. The United States engineer's bulletin.

Q. Where is that published? A. Washington.

Q. Who sent that to you? A. The chief of engineers.

Q. Do you know when the first notice when the existence of the extension, the actual existence of it, and the white light upon it was sent out in the shape of notices to mariners?

196 Mr. Houpt: I object to this question on the ground that it appears in evidence just what notices were sent out. There were two notices to mariners and a bulletin and a chart; that is all the government claims were sent out.

Counsel asks the witnesses what actual notice was given. That is immaterial, because if there was any other notice given it must be later than the date of this accident.

The Court. The witness has already stated the first notice of the actual existence of the construction of that breakwater, and that it was in September 1901 that the first official notice was given.

Mr. Kremer: That was the first notice. I want to show whether he knew when the first notice was sent out to mariners. This came to him from the engineers' office.

The Court: He said there was no other notice prior to that time.

Mr. Kremer: I asked him if he knew when it was sent out afterwards.

The Court. I do not think that is material unless it was in existence here at that time.

The Court sustains the objection, and counsel for defendant excepts to the ruling.

Mr. Kremer. I wish to make an offer in the record such as is found on page 193 of the present record, which is as follows: being Notice to Mariners dated Washington October 19, 1901 which purports to give all information up to October 9, 1901; and is as follows:

197 "(120) Lake Superior—Two Harbors—General information—The following information relating to Agate Bay or Two Harbors, Minnesota, has been received from the Branch Hydrographic Office, Duluth, under date of October 9th, 1901.

The extension of the East Breakwater has been built nearly up to full height, excepting a gap of 50 feet, where a crib was destroyed by a vessel and not yet replaced. This extension is now a prominent object and readily seen in ordinary weather. A white light is maintained throughout each night at the outer end of the extension on a mast 14 feet above Lake Superior. The fixed red light at the outer end of the old portion of the breakwater was moved 35 feet eastward from its former position during the week ending June 15th, 1901. Vessels can remain in the harbor during severe storms.

Fair means are afforded vessels passing Two Harbors, to test the accuracy of their compasses, owing to the fact that the streets of the village run in a true North-South direction, and the avenues true West and East. These parallel indentures can be easily distinguished in clear weather at a distance of 8 7/10 (10 miles) from shore.

From the lakeward the alignment of the streets bear North true (N. 5/8 W. Mag.) and the avenues West true (W. 5/8 S. mag.)

On account of considerable (but vaguely known) local attraction near the shore, a ship would be five miles from land when using this convenience for compass correction. (citations.)"

198 Q. How long does it take after you receive notice, for you to report an obstruction to navigation or the change of a light on the published map to the various ship masters and owners? A. That depends upon when the notice comes in.

Q. I mean from the time you get the notice until you send it out, how long does it usually take? A. It takes from six to ten days.

Q. In other words, suppose you had received notice of the existence of those cribs and the breakwater and the light upon it in May, the middle of May, when would the notice probably have been sent out? A. Before the end of May, at least.

Q. And in the progress of the work, crib after crib being extended there, how long would it have taken to give notice of each extension? A. The same time, about ten days.

Q. Do you know as a matter of fact whether or not it is the duty of the government engineer in charge of such work to report such obstructions and lights? A. To be sure.

Q. Whom should it be reported to by him? A. It should be reported to the chief engineer and by the light house board, both.

Q. Suppose such information had been given to you in Duluth by the engineers' office in charge of the work, what effect would that have had, what would have been done with that information?

199 Mr. Houpt. This question is objected to because it is based upon no conditions that existed at that time, and because it calls for the opinion of the witness as to something that had not happened, if something else had been done.

* * * * * * * * *

The Court: I think the witness may answer the question. These are all departments of the government.

The Court overrules the objection and counsel for plaintiff excepts to the ruling.

200 Mr. Houpt: The effect of this would be to allow this witness to state what the government should do in a certain case in the course of its business.

Q. Suppose such information had been given you in Duluth by the engineers' office in charge of the work, what effect would that have had, what would have been done with that information? I mean, in the course of the business of your office? A. Within ten days it would have been known to every mariner on the Great Lakes.

The Court: That is not the question asked.

Q. What steps would you have taken, what did you have to do with it? A. It would be sent to Washington and printed.

Mr. Houpt: I move to strike out the answer of the witness as to its being printed.

The Court: Yes; he cannot tell what would be done in Washington.

Q. To whom would you have sent it in Washington? A. To the Hydrographic Office at Washington.

Q. Do you report when you see in the newspapers, or did you report when you saw in the newspapers notices of this disaster, did you make any report of it to the Hydrographic Office?

Mr. Houpt: I object to that.

The Court: I do not think it makes any difference. It was all over then.

Q. How long were you a sailor. A. Since 1867, from 1867 to 1896.

Q. You were a sailor on what? A. On the Ocean and lakes.

201 Q. In what capacity? A. From boy up to master.

Q. Do you know and were you in 1901 familiar with the lights usually carried by vessels on the lakes? A. It is my duty to be so.

Q. Were you? A. Yes, sir.

Q. What lights do vessels at anchor on the Great Lakes exhibit at night? A. A white bright light.

Q. Suppose that as a mariner you were bound for the port of Two Harbors on a dark night, and should see a white light several hundred feet off from the regular beacon light, which is a red light there at Two Harbors, what would a mariner ordinarily take such light to be there or to represent, without knowledge of the existence of an obstruction which might be lighted up in that way?

Mr. Houpt: I object to the question as calling for the conclusion of the witness.

The Court: I think the objection should be sustained. The jury can draw their conclusion as well as this witness.

The Court sustains the objection and counsel for defendant excepts to the ruling.

Q. In your experience as a mariner have you ever known the use of any other than a white light to mark obstructions to navigation, extensions of piers, or aids to navigation? A. Yes.

Q. In your experience as a mariner what do you say as to whether or not a red light is a better light to mark the extension of a breakwater, say at Two Harbors, running out as that extension did from the old pier which is marked by a red light?

202 Mr. Houpt: I object to this question also as calling for a conclusion [for] the witness.

The Court: I think the question should take the direction of ascertaining what the usual practice is; then we can draw our conclusions from that just as well as this witness. I think the objection should be sustained.

Counsel for defendant excepts to the ruling.

Q. On what kind of structures have you seen red lights used, for the purpose of marking obstructions to navigation? A. Pier extensions and breakwater extensions.

Q. They use them on the lakes? A. Yes, sir.

Cross-Examination,

By Mr. Houpt:

Q. Are you in the employment of the Davidson Steamship Company? A. Do I have to answer that question?

The Court: Yes.

A. No.

Q. You say that you have seen red lights on Government breakwaters and piers; do you mean b-eakwaters and piers in the course of construction, or after they are completed? A. No; in the course of construction.

Q. In the course of construction? A. Yes, sir.

Q. Where did you see red lights, you spoke about red lights that were displayed, warning lights? A. Yes, of course, during the process of construction of a breakwater.

Q. Where did you see red lights displayed on any
203 breakwater in course of construction? A. I have seen one on the breakwater at Buffalo.

Q. Was it a temporary light or a fixed light? A. It was a temporary light while the breakwater was in construction.

Q. It was a temporary light on the breakwater while the breakwater was being constructed? A. Yes.

Q. That was at Buffalo? A. Yes, sir, I saw it on the breakwater.

Q. How long ago was that? A. I don't know. Fourteen or fifteen years ago, 1889 I think.

Q. It was in 1889? A. I wouldn't be sure; it was 1889 or 1890—I remember I was running to Buffalo steadily at that time and had good occasion to see that light.

Q. Was it on the breakwater that was being built, or was it a light on the part that was being repaired? A. It was the extension of the old breakwater.

Q. That was in 1889? A. I think so.

Q. Did you know, or do you know now whether it was a temporary light, or a fixed light? A. I don't know of any distinction between a fixed light and a temporary light.

Q. You don't know what a fixed light is? A. Yes, I know what a fixed light is, and temporary light; but I don't know what a fixed, temporary light is.

Q. I asked you whether the light you referred to as having seen that at Buffalo was a fixed light, or a temporary light. A.
204 It was a temporary light, I presume. I don't know whether they put one out all the time or not. It was there when I was trading there, until the breakwater was finished.

Q. You said in your testimony on the former trial, did you not, in answer to this question, "Do you know whether it was a fixed light or a temporary light?" you answered "I do not know;" did you so answer on your other examination? A. No, sir, I did not know then, I do know now. I have posted myself since that; I have looked up the records.

Q. You have looked up the records? A. Yes, sir of the United States Engineers on the bulletins.

Q. You have been very busily employed in looking after this case, have you not? A. For my own protection.

Q. And not for the protection of the Davidson Steamship Company? A. No, sir, not at all.

Q. How was it for your protection to look up the question [fo] the Buffalo breakwater or the light on it in 1889, to know what light was displayed there, you were not in any danger? A. I didn't want to be held up as a fool by you before this jury, as you did the last time.

Q. You thought you were in danger of that? A. Yes, sir. The last time—

Q. The last time you said you didn't know. A. I know that.

Q. What pamphlets did you look it up from? A. In the United States Engineers' bulletins.

Q. United States Engineers' bulletins? A. Yes, sir.

Q. That made a very strong impression upon your
205 mind as to the [like] you saw there in 1889? A. Pretty middling.

Q. Was that impression made so strong because it was so rare seeing a red light on new Government work? A. No, sir, it was not rare. I could see it at any time.

Q. You could see that at any time? A. Yes, sir.

Q. It is a very common thing? A. Yes, sir, at any time.

Q. Have you them here at Duluth harbor, have you seen them here? A. No, sir, not at Duluth harbor.

Q. Not at Duluth harbor? A. No, sir.

Q. Did you see them at Two Harbors? A. I can't say that I did.

Q. Can you name any harbor on Lake Superior where you ever saw Government work in process of construction lighted by a red light? A. No, not on Lake Superior.

Q. Not on Lake Superior? A. No, sir.

Q. Can you name any place except Buffalo breakwater where you ever saw Government work in the process of construction lighted by a red light? A. Yes, sir, I can.

Q. Where? A. South Chicago.

Q. South Chicago? A. Yes.

Q. You have been looking that up since, have you not? A. Yes, a little.

Q. When did you look that up? A. That is in the course of my duty as Nautical expert. It is my business to look them up.

Q. Did you look that up for your own protection, or for the protection of the Davidson Steamship Company? A. Not exactly my own, but to know what I am talking about.

206 Q. Has the Davidson Steamship Company hired you to look that matter up? A. Not exactly.

Q. Did they employ you? A. No, sir.

Q. Did they pay you for looking that up? A. I don't know the Davidson Steamship Company.

Q. Did anybody connected with the Davidson Steamship Company pay you for looking that up? A. I don't know the Davidson Steamship Company.

Q. Did anybody representing the Davidson Steamship Company, hire you, or pay you for getting that information? A. No.

Q. Did anybody connected with that company ask you to get the information? A. I don't know them. How could the company ask me when I don't know any of them. I don't know any of them nor their agents. I am not on speaking terms with them.

Q. You are on speaking terms with their attorney? A. I have known Mr. Kremer for twenty years, I guess, I am acquainted with him.

Q. Then you are on speaking terms with some one representing the Davidson Steamship Company, are you not? A. I don't know that he represents them anywhere except in Court.

Q. Then you say, Mr. Henrich, that you have not been employed in any manner by the Davidson Steamship Company? A. No.

Q. To acquire this information? A. No.

Q. You are not under pay now with the Davidson Steamship Company? A. No, I am not. My employers pay me enough without that.

Q. Where are these pamphlets that you refer to? A. They are on file in the Engineer's office in Washington.

207 Q. Did you go to Washington to look them over? A. We obtain copies when we want them.

Q. Where are these copies? A. I don't know. In the waste basket by this time, I guess.

Q. Do you know where the copies are? A. They are in the waste basket.

Q. Did you throw them in the waste basket? A. Yes.

Q. You threw the copies in the waste basket? A. Yes, sir.

Q. You simply procured them then to obtain this particular information as to the red light at South Chicago and on the Buffalo breakwater? A. Oh, no, not at all. It was to see whether the engineers exhibited a red light at South Chicago and Buffalo alone, but also to see all the places on the Great Lakes where they have exhibited red lights?

Q. You knew that you were going to be called as a witness and asked about this in this action? A. No, I had no idea I was going to be called up here until within an hour ago.

Q. Why didn't you save those pamphlets and produce them here in Court? A. I have no business to. I work no more for the Davidson Steamship Company than I would work for anyone else outside of my office.

Q. You thought that your verbal testimony would be better than the other kind? A. Yes.

Q. Does your office get these bulletins that are issued in the Engineers' department? A. Yes, sometimes.

Q. Sometimes? Is it not a regular thing for you to get them? A. Yes.

208 Q. Do you read them when you get them? A. Indeed I do. Every word of it.

Q. Every word of it? A. Yes, sir.

Q. Then you knew of the work going on there in Agate Bay, and of the extension of that 300 feet of breakwater, did you not? A. Yes.

Q. When did you learn of that? A. In 1899.

Q. And you saw this bulletin that was issued April 1, 1901, didn't you? A. Yes, I have seen that.

Q. You know, don't you, that lights are always displayed on these Government works? A. Sometimes.

Q. You know they are sometimes? A. Yes.

Q. Is it a part of your business to find out whether they are or not? A. If I can get the information, yes.

Q. Don't you know that you can get the information from the Engineers' office? A. If I could smell that they are putting up a light, I could. How could I know whether they are going to put up a light? Can I go and ask the engineer's office if they are putting a light up or not. I am not almighty.

Q. You know where the engineer's office is here don't you? A. Yes, sir, I do.

Q. Here in Duluth, I mean? A. Yes.

Q. How far is your office from the engineer's office? A. Half a block.

Q. Half a block away? A. Yes, sir.

Q. You knew didn't you that if you [webt] down to the engineer's office you could find out about any light, and
209 whether or not a light had been used on this new breakwater? A. You bet I could.

Q. You could have gone there and got that information? A. I could had I known it.

Q. You didn't do it, did you? A. They had been constructing that breakwater for two years, they had been at it for two years. How could I tell they were going to put one up or not? How could I tell there would be one put up or not?

Q. You could have found it out couldn't you? A. I tell you they had been constructing that breakwater for two years.

Q. That bulletin told you that the breakwater would be built in 1901, didn't it? A. It will be finished in 1901. It had been under construction for at least two years previous to that.

Q. But the bulletin notified you that the breakwater would be built in 91, and notified you when it would be built, in 1900? A. The bulletin told me nothing new.

Q. It told you that, did it not? A. Yes, but it told me nothing new. We knew by information two years previous to the information in the bulletin.

Q. When you read this bulletin in 1901, you knew that they were expecting to build a breakwater that year? A. Yes.

Q. Didn't your knowledge of the conditions in Agate Bay inform you that a light would be necessary there, or didn't you know anything about the Bay? A. I know a little about the Bay.

Q. You knew a little about the Bay? A. Yes.

210 Q. Then you knew that lights would be necessary there? A. I don't know. That is the United States Engineer's business. They were doing the building.

Q. Didn't you think that lights would be necessary, or don't you think that lights would be necessary as a signal of obstruction? A. I should think so if it was there permanently.

Q. But you never took the pains to go half a block to the United States Engineer's office and ascertain whether any lights were being displayed, and if so what kind of a light? A. I didn't do it because I could not know it.

Redirect Examination

By Mr. Kremer:

Q. Was it a part of your duty as Hydrographic officer to make daily visits to the Engineer's office to obtain information? A. Not at all.

John Krey, a witness produced and sworn on the part of the defendant testifies as follows:

Examination-in-Chief

By Mr. Kremer:

Q. What is your full name? A. John Krey.

Q. Where do you live? A. At present?

Q. Yes. A. Weehauken, New Jersey.

Q. What is your occupation? A. Civil Engineer.

Q. What is your present employment? A. I am

211 division engineer for the New York Central Railway Company, in charge of the river division.

Q. In 1901, what was your occupation? A. I was assistant engineer at the United States Engineer's office in Duluth.

Q. Where were you stationed? A. Agate Bay, Two Harbors.

Q. What had you to do, who was your employer at that time? A. The United States Government.

Q. What department of the Government? A. The engineering department.

Q. Who was your immediate superior officer? A. Captain Gaillard.

Q. Where was he stationed? A. Duluth.

Q. What [—] you to do with the extension of the East breakwater at Two Harbors? A. I was in local charge of that work.

Q. You had charge of the work in that location? A. Local charge of it, yes.

Q. Do you remember when it was that you put down the first crib of that extension? A. In May, I think about the middle of May 1901.

Q. Where was the first crib put down, at which end of the new extension? A. At the west end.

Q. At the west end of the extension? A. Yes, sir.

Q. Whereabouts was that? A. At the shore end, the outside end of the old breakwater.

Q. Then how did you put down the subsequent cribs? A. They were put down as soon as we could get the stone
212 ready for them.

Q. Were they joined to each other, were the cribs joined together? A. No. They were put as close together as we could sink them, but disconnected.

Q. When did you first put any kind of a light on the extension? A. Why, just about as soon as the crib was sunk, that same evening.

Q. That same evening? A. Yes, sir.

Q. Did you do that with the first crib and with everyone after? A. With every crib, yes, sir.

Q. Did you maintain more than one light at a time? A. No, sir.

Q. To whom did you report from time to time the progress of the work there? A. To Captain Gaillard.

Q. Did you at any time report the exhibition and maintenance of a light on the extension? A. Yes.

Mr. Houpt: Were those reports in writing?
Witness: Yes, sir, weekly reports.

Q. When did you make the first written report in regard to the exhibition of a light on the extension? A. I suppose the next following statement when I made the report went in in May.

Mr. Houpt: I move to strike out the answer of the witness because he says it is what he supposes.

Q. You can state it as near as you can. A. The month of May 1901.

Q. Did you at any time send a written communication to Captain Gaillard in relation to that light, and the publication of its exhibition and maintenance? A. Yes.

213 Mr. Kremer: Mr. Houpt, I will ask you to produce that letter.

Mr. Houpt: When was that?
Mr. Kremer: Some time in May.
Mr. Houpt: That is a report respecting the light?
Mr. Kremer: Yes, and that it should be published.

Q. How, and in what manner did you send that letter or communication to Captain Gaillard? A. By mail.
Q. Do you know where that letter is now? A. No, I have no idea.
Q. Can you give us in substance, its contents, will you give us the contents of that communication, as near as you can, in substance?

Mr. Houpt: If the Court please, we object to this question upon two grounds: First, that it is asking the witness to detail the contents of a written communication; and second, that the communication itself if it were here, would not be admissible in evidence.

* * * * * * * * *

214 The Court: I think the question about this letter divides itself into two grounds: Whether the letter is admissible to show the facts of this witness having notified the engineering department that the light had been put up. It is claimed by Mr. Kremer that the letter is also admissible to show the fact that this witness recommended that this information should be published.

* * * * * * * * *

216 The Court: I think it is competent for the defendant here to show that when this light was put up on this crib; as I understand the witness in putting down the crib they put a light at the end of it, then they put in another crib beyond that, and removed the light up to the end of that crib and so kept on moving the light on as they put the cribs down, exhibiting a white light at the outside end of the last crib that was put down. I think it is competent for the defendant to show that such was done and that when it was done it was reported to his superior officer. I think that is all that you can show. I think it is for this jury then, from all of the evidence here as to the light, the kind of light marking the extension and where it was placed, to say whether or not, (for the Government would be bound by the action of its officer,) it would be for this jury to say whether or not the Government had properly performed its duty in that respect. The Government of course must be responsible for the action of its officers. If this jury should think that after the report was made to Captain Gaillard he ought to have reported it to the department at Washington, or ought to have forwarded it

to the department and the department ought to have published it, it would be for the jury to say whether the failure to do so was negligence or not, under all of the circumstances. I do not think it is competent evidence to show what this witness recommended; and I do not think that the letter is competent to show that the witness made a report.

Mr. Kremer. There is no controversy about the light having been there. It is admitted that this witness reported to his superior officer Captain Gaillard that the light had been put up?

217

Mr. Houpt. Yes; that is admitted. There is no question about that.

The Court. It appears in evidence that there was no publication; or, at any rate there is no evidence that there was any publication by the government; So it will be for this jury to say whether the government performed its duty in what it did do; or whether it was the duty of the government to have made a publication, in view of all the circumstances of the case.

Mr. Kremer. If your honor please, I would like to make this [this] one suggestion. Here is a man who knows better than any one else whether the placing of that work there was a danger, whether it was a [menace] to mariners, and whether mariners ought to have been advised of its existence. Is not this testimony competent upon that line?

The Court. I think not. I think we can judge about that just as well as anybody. I think with the admission, as I understand it, it is admitted by the government that the light was put up as has been described, on these cribs as they went along, that is this white light which was placed fourteen feet above the water, and that such placing of the light was reported by this witness to his superior officer; I think, with that admission, that is as far as you can go. I do not think the testimony you propose to offer is competent.

Mr. Kremer. Very well. We will save an exception to the ruling of the Court.

218

The Court. Yes, you can take your exception to it.

Q. Can you give me the substance of the contents of that letter? A. I don't know as I can. I have written a good many letters upon that same subject.

Mr. Houpt. I will try and ascertain the fact as to whether we have the letter, between now and tomorrow morning.

The testimony of Henry Leisk, on behalf of the defendant, given on a former trial is now read by Mr. Kremer, as follows:

Direct Examination

By Mr. Kremer:

Q. What is your full name? A. Henry Leisk.

Q. Where do you live? A. At Milwaukee, when I am at home.

Q. What is your occupation? A. Ship master.

Q. How long have you been a master of ships on the lakes? A. Since 1878.

Q. Where have you sailed, on what waters in the world? A. I have sailed over the lake regions and on salt water, the eastern and western hemispheres.

Q. How long have you sailed altogether? A. Altogether as a seaman, from boy to captain, fifty years pretty near.

219 Q. What ship are you master of now? A. Steamer America.

Q. What kind of a craft is she? A. She is 3300 ton vessel, steel built.

Q. Have you ever been in the harbor of Two Harbors, and were you at any time prior to 1901? A. Yes, sir.

Q. How often had you been there prior to 1901? A. I think on two or three occasions. I was there in 1886 and perhaps in 1889, and then I was there in 1891 and 1892.

Q. Have you been there since 1891? A. Yes, sir.

Q. Are you familiar with that harbor and the breakwaters there? A. To some extent.

Q. What publication do you consult in your business as ship master to learn the color and location of lights on breakwaters and piers? A. The light house book which is annually gotten out.

Q. The same as Exhibit 1? A. Yes, sir, that is right.

Q. Suppose that as a mariner you were in command of a ship and should arrive off the harbor of Two Harbors with the wind blowing northeast and hard, and you had no notice or information of an extension of the breakwater there, and found there in addition to the light indicated in the light house book, the large red light on the east breakwater, a small white light anywhere from three to five hundred feet to the west of that red light, what would a mariner, or what would you make out of that light? A. There are several things which a man might assume.

220 Q. What would an average mariner assume that it was? A. A white light indicates a signal on some floating object, such as an anchored vessel, or it might be a small yacht, for instance, we meet all of these things coming into the harbor, naptha launches, boats traversing back and forth.

Q. If you saw this light and took it to be twenty feet above the water, what would you take it to be?

Mr. Houpt: Object to that.
The Court: That is the proper question.

A. The Government, for vessels at anchor, specify that we shall carry a bright light not to exceed twenty feet above the vessels deck, naturally a light fourteen to twenty feet high would be considered a vessel at anchor.

Q. Captain do you remember of seeing a vessel at anchor at any time in Two Harbors? A. I could not recall that.

Q. Would it be an unusual thing to find vessels at anchor in Two Harbors? A. I think not.

Q. Would it be an unusual thing with the wind blowing a gale from the northeast that a vessel at anchor would drag her anchor? A. That is not an unusual thing.

Q. What does a single red light displayed on the water, and not in motion indicate to a mariner?

Mr. Houpt: Object to the question as incompetent, irrelevant and immaterial.

The Court: I think he may answer.

221 A. Red lights in general are placed on stationary objects, and is a signal of danger. We generally look upon red light as being a signal of danger.

Q. Captain, do you remember of any case where you saw a red light used in that way to indicate an obstruction of navigation or danger?

Mr. Houpt: Object to the question unless it is confined to works under construction, such as breakwaters or piers.
The Court: I think he may answer the question.

A. I could not say.

Cross-Examination

Mr. Houpt:

Q. [Caaptain], would you in night time, with the wind blowing, the night dark, the sea rough, enter a harbor, or attempt to enter a harbor without knowing anything about the condition of that harbor? A. No, sir.

Q. You think it would be your duty to ascertain first what the conditions were surrounding that harbor, and whether there were any impediments to your entry? A. If I had never been there previous to that time?

Q. If you had not been there for a year or more before that time wouldn't you feel as if you should know the present condition of the harbor? A. Not, generally speaking—these harbors are generally supposed to be in a condition in which vessels may enter at any time.

Q. It is true that for the last ten or fifteen years the
222 Government has constantly been engaged in building breakwaters near these harbors? A. Yes, sir.

Q. These breakwaters change the conditions under which a vessel may enter the harbors? A. To some extent.

Q. Wouldn't you consider it the part of a prudent mariner to keep informed as to what changes in that regard are going on in harbors? A. We generally do.

Q. How do you inform yourself in that regard? A. With these books that Mr. Kremer has exhibited, and by pamphlets which are sent out by the Government.

Q. These Notices to Mariners which are issued by the hydrographic office? A. Yes, sir.

Q. And the bulletins that are issued by the engineer's office? A. Yes, sir.

Q. And the charts and maps? A. Yes, sir.

Q. These are your sources of information? A. They are.

Q. Your attention has been called here to the light house book. A. Yes, sir.

Q. Every mariner knows that that is issued once a year? A. Yes, sir.

Q. And he knows also that that book only contains a record of permanent or fixed lights? A. That is right.

Q. He knows that it does not concern itself about the lights upon temporary places, on works in the course of construction. Now, Captain, I ask you to look at Government's Exhibit "A" and particularly to the dotted lines running
223 to the southwest from the light at the end of the old pier, now taking that Exhibit Captain in connection with plaintiff's Exhibit "C", being Notice to Mariners, and which contains this notice:

"(859) Lake Superior—Minnesota—Two Harbors breakwater Caution—Referring to Notice to Mariners, No. 30, (703) of 1899, further information has been received that the work on the extension of the breakwater piers at Two Harbors, has been actively carried on by the Government since the opening of navigation.

A communication from the contractor, dated July 31, 1900, states that the submarine work on the extension of the East breakwater has now advanced so far as to leave only 16 feet of water over the embankment. Such a spot is located about 200 feet from the end of the old breakwater.

Masters of vessels are therefore cautioned, on entering the harbor, to give the old breakwater a berth of 300 feet; and not to round the East breakwater close on board, as formerly, on account of this danger."

Now Captain that notice was published August 11th, 1900 and supplementary there to the Engineer's Bulletin of April 1st, 1901. Remember that this collision occurred on the 24th day of July, 1901.

"Agate Bay, Minn. (Two Harbors). Before improvement, fully exposed to winds from southeast and to heavy swells from northeast and southwest winds. January, 1901. The west breakwater has been completed and is 900 feet
224 long. East breakwater is 750 feet long, and during next summer will be extended 300 feet in a southwesterly direction, the riprap embankment being already in place under water. Vessels should keep 300 feet away from the outer end of the East breakwater. Vessels can remain in harbor during severe storms."

Taking that information into consideration, which a prudent mariner ought to know, and in connection with this chart, with which a prudent mariner should be familiar, what would you then say that a prudent mariner, entering that harbor,—should he have mistaken a white light out there for a ship at anchor? A. I would not answer that—I couldn't say what other people may do.

Q. He would have notice that he should round this point three hundred feet? A. He may not be in possession of that information.

Q. He should have been in possession of it? A. I don't know as to that.

Q. Wouldn't a prudent mariner have been in possession of that information? A. I could not answer that question.

Q. If he had been in possession of that notice then he would have known what that white light meant out there? A. I could hardly expect that, there is no light mentioned in that bulletin.

Q. I will ask you something further. You have sailed in and out of these lake harbors during ten or fifteen years? A. Yes, sir.

Q. You have seen a great deal of work in these harbors under construction? A. Yes, sir.

225 Q. You have seen that all of this work under construction in these harbors has been lighted by a white light? A. That I could vouch for.

Q. Can you remember of any different kind of light being displayed? A. There are so many lights in construction work —I didn't pay any attention.

Q. Can you remember any other light than a white light being used in construction work? A. I went to the south shore about a week ago.

Q. I am asking prior to July 24th. A. I could not recall to mind, I don't remember any.

Q. You have seen a white light displayed? A. White lights and red lights.

Q. Where have you seen a red light displayed upon any work in process of construction in any of these harbors prior to July 24th? A. I could not mention any place in particular.

Q. Where did you procure these Notices to Mariners? A. I received these notices this present season, and have for several seasons, at Detroit.

Q. You got them from the postoffice? A. Yes, sir.

Q. Through the marine post office at Detroit.

Q. That is the marine post office? A. Yes, sir.

Q. That is where the marine mail is sent? A. Yes, sir.

Q. Where do you get the bulletins, these that are
226 issued by the Engineer's Department? A. Those are the monthly ones, you mean those?

[A.] Yes. A. I received them there likewise.

Q. By mail? A. Yes, sir.

Q. How then did they usually come? A. I have been receiving the bulletins from the hydrographic office in Washington.

Q. I am speaking now more particularly prior to July 24th, 1901? A. They were sent to the vessel.

Q. Sent to the vessel? A. Yes, sir.

Q. Where did you obtain the charts? A. I purchased the charts in the hydrographic office, such as Cleveland, Detroit, Buffalo, or other places.

Q. Do the owners of vessels supply these, or do the masters usually obtain them themselves? A. The masters generally purchase them, and the owners pay for them.

Q. They are charged to the owners of the boat? A. Yes, sir.

Q. That is a part of a duty of a master of the boat to obtain this information? A. Certainly.

Q. A master of a boat who obtains that information and follows the information contained in there has sufficient amount of knowledge concerning the harbors so he can safely navigate the lake? A. I cannot answer that question.

Q. You never had any difficulty did you? A. Yes, I have difficulty like other men—I have troubles a good many. Few have not had trouble.

Q. What is the date about of the opening of naviga-
227 tion on these lakes, as a rule? A. It varies from the first of April to the first of May, and has been later.

Q. The first of April is about the time? A. The average will be about the 20th of April—it depends upon the winter season.

Q. At the opening of navigation do you always receive from the engineer's office a bulletin containing information concerning the condition of the harbors on the lakes? A. No, sir.

Q. You do during the course of the season? A. Yes, sir.

Redirect Examination

Mr. Kremer:

Q. Do you know of any case where the master had gone to the engineer's office and obtained a pamphlet such as Exhibit "D", like that? A. I cannot say that any person I know of ever went there—the notice says you can call there and receive them.

Q. In your experience did you ever apply to the engineer's office for circulars or pamphlets? A. No, sir.

Q. The Notices you say you received by mail are those coming from the hydrographic office? A. From the Navy Department, Washington, yes, sir.

Mr. Houpt:

Q. The reason why you did not apply to the engineer's office for them is because you received them by mail? A. Yes, we got them by mail. The Government is very liberal in distributing them around.

228 Mr. Kremer:

Q. Captain, do you remember of ever getting one of these circulars by mail, Exhibit "D", say if you ever got one of these by mail? A. Not in that form.

The testimony of Edgar D. Chilson, on behalf of the defendant, given on the former trial, was read by Mr. Kremer, as follows:

Direct Examination

Mr. Kremer:

Q. Where do you live? A. ——— Michigan.

Q. What is your occupation? A. Master of a vessel.

Q. How long have you been sailing? A. About forty three years.

Q. And where? A. Well, over all the lakes between Chicago, Duluth, and Ogdensburg.

Q. In what kind of a vessel? A. By sail and steam.

Q. What steamer are you the master of now? A. Thomas Mather.

Q. What size steamer is she? A. She is 1972 net tons.

Q. Were you in 1901 familiar with Agate Bay, Two Harbors? A. Yes, sir.

Q. Had you been there at that time? A. I would not be positive that I was there in 1901; but I was previous to that.

Q. Suppose that you were bound for Two Harbors
229 in the night time with a gale of wind blowing from the northeast, and it was a dark and cloudy night, and you were about to enter Two Harbors, and you found a red light on the east breakwater, and you had no notice of an extension of the east breakwater, or of what light there was on it, and you saw, as you approached the harbor, at some point to the west of the permanent red light, a small white light from three hundred to five hundred feet away from you, what would you say under those conditions, a mariner of ordinary skill and exercising ordinary care, would take that light for?

Mr. Houpt: Object to the question for the reason that the word "small" is put in the question.

The Court: Leave out the word "small".

Mr. Houpt: This is a hypothetical question and it should embrace every phase of the case. I think the question should go further and say "considering that all breakwaters and piers in these harbors are lighted with white lights."

The Court: I think you can cross-examine with that. Objection is overruled.

Q. Assuming further captain that the white light that you saw was anywhere from fourteen to twenty feet above the water.

Mr. Houpt: Object to that question because the testimony shows that the light was fourteen feet above the water.

The Court: One witness testified that the light was from fourteen to twenty feet above the water. I think he may answer the question.

230 A. You might take it for different things—a man coming from the lake might take it for a light on the shore, or take it for a boat at anchor.

Q. Suppose that he determined that it was not on shore, what then would he take it for? A. If no obstruction was there he would take it for a vessel at anchor.

Q. What light does a vessel at anchor carry? A. A white light.

Q. Do you know whether vessels came to anchor in Agate Bay or not? A. I have seen vessels at anchor in Agate Bay.

Q. With a northeast gale would you think they would be liable to drag their anchors out towards the passage, or opening? A. It would be possible.

Q. Captain, what to a mariner does a single white light indicate out in the water of a bay? A. It would indicate different things. It could indicate a vessel at anchor, or a small boat.

Q. I mean a red light? A. That would mean that there was an obstruction there of some kind.

Q. Does a single red light have any other significance among mariners than that of a danger signal?

Mr. Houpt: Object to the question on the ground that it is irrelevant, incompetent, and immaterial.

The Court: Objection is overruled.

A. If you are in a harbor, or ascending a stream a red light should be on the starboard—in ascending a stream, or entering a harbor?

231 Q. What you mean by that is, if you saw a red light in a stream or harbor, you would pass to the left of it? A. Yes, sir.

Q. And leave it on your right? A. Yes, sir.

Q. If you saw it out in a bay, or where you were not in a stream, what would a mariner take it to indicate? A. It would be a danger signal.

Q. Have you ever seen red lights marking obstructions to navigation in connection with submerged work and obstructions to navigation prior to July 24th, 1901?

Mr. Houpt: Object to the question unless it is confined to such work as [us] under consideration in this action.

The Court: I think he may answer the question.

A. I could not answer that question.

Q. Do you recollect? A. No, I cannot recollect any.

Q. What book do you consult captain and do you use as a guide to learn of the lights which are used on piers, breakwaters and boats? A. The Lighthouse book.

Q. Similar to this Exhibit "1"? A. Yes, sir.

Cross-Examination

Mr. Houpt:

Q. You said that in entering a harbor if you saw a white light outside and you knew there was no obstruction, you would take it for a ship at anchor? A. Yes, sir.

Q. But if you didn't know there was any obstruction there, you would think it was indicative of some obstruction? A. I don't understand you.

232 Q. If you didn't know that the channel was from an obstruction then you might think that that white light was placed there to indicate that there was an obstruction? A. If I didn't know?

Q. Yes. A. If I supposed it was free I would take it for a boat at anchor.

Q. But if you had reason to think that there was an obstruction there you would take it for an obstruction? A. If I had reason to think so.

Q. If you didn't know whether there was an obstruction there or not, you would be in doubt? A. No, not if I felt in my mind that there was no obstruction there, I should call it a vessel at anchor, or a small boat.

Q. If you were in doubt about it, or if you didn't know anything about the situation, then you would not know whether it indicated an obstruction or ship at anchor? A. If I didn't know anything about it I would turn round and go into the lake.

Q. Or you would stop and find out? A. If I didn't know anything about it I would turn round and go into the lake.

Q. In other words, you would not go into the harbor unless you knew conditions there? A. We are supposed to know.

Q. You always do intend to know? A. I always do.

Q. That is a part of the business of the matter? A. Yes, sir, of course, that is what we are paid for—but there are cases where we are not posted.

Q. That is the reason you are master because it is a
233 part of your business to know. Captain, you say that you consult this book of Lights and Fog signals? A. Yes, sir.

Q. You consult that when you wish to find out where the permanent lights are located? A. Yes, sir, or buoys, or anything of that described that they note.

Q. That is, in the jurisdiction of the Lighthouse Board. Now you have noticed and observed in the course of your career as a sailor, Captain, that a great many lights are placed in the harbors that are not under the jurisdiction of that Lighthouse Board? A. Yes, sir.

Q. Those are lights of a temporary nature that are put out as signals while work is in progress? A. Yes, sir.

Q. These lights are white lights, are they not? A. I wouldn't say that they were.

Q. So far as you remember. A. When they were building the Milwaukee breakwater the end of that breakwater was marked by a red and white light. It was on a little Light Ship.

Q. Wasn't it permanent? A. I could not say as to that.

Q. It marked the end of the breakwater when it was under construction. That was on the Light Ship? A. Yes, sir.

Q. What do you mean by Light Ship? A. A small vessel.

Q. That vessel was anchored there? A. Yes, sir.

Q. It was anchored there for the purpose of maintaining this light? A. Yes, sir.

The Court: Q. You say it was in the Lighthouse
234 chart? A. I don't think it was in the Lighthouse book.

Mr. Houpt:

Q. Now, Captain, did you receive these Notices to Mariners, that are issued by the hydrographic office? A. Yes, sir.

Q. Do you get the bulletins that are issued by the engineer's office? A. Yes, sir, but not very often.

Q. Do you get the charts issued by the engineer's office? A. Sometimes we get them, and sometimes we don't get them, when they are first issued.

Q. But you get them as you feel you need them? A. Yes, sir.

Q. When you want to acquaint yourself with the condition of a harbor, you get them? A. Yes, sir. When I go to a place that I am not familiar with I get a chart.

Q. And inform yourself? A. Yes, sir.

Q. These can be obtained very readily? A. No, you got to get them at a certain point.

Q. You can get them by writing for them? A. Yes, sir.

Mr. Kremer:

Q. Did you ever hear of masters going to the engineer's office to get these pamphlets? A. I never did.

Q. Do you know whether you ever have received these engineer's pamphlets by mail? A. Let me look at them.

Q. I show you Exhibit "D"? A. I think I received that one.

Q. Do you know where you received it? A. Probably at Detroit.

Mr. Houpt: Detroit is a general marine post office? A. Yes, sir.

235 Q. Are you an employe of the Davidson S. S. Co.? A. No, sir.

Q. Have you ever been? A. No, sir.

The testimony of Captain James Lyons, on the part of the defendant, given on the former trial, was read by Mr. Kremer as follows:

Direct Examination

Mr. Kremer:

Q. What is your full name? A. James B. Lyons.

Q. What is your occupation? A. Ship-master.

Q. Where do you live? A. In Detroit.

Q. How long have you been sailing? A. Twenty-two years.

Q. Where? A. On the Lakes and ocean.

Q. In what capacities? A. Every capacity.

Q. From boy to master? A. Yes, sir.

Q. How long have you been master? A. For five years.

Q. What ship are you master of now? A. The Steamer Manhattan.

Q. What is her size or carrying capacity? A. 2400 tons.

Q. Are you familiar with the harbor of Two Harbors? A. Yes, sir.

Q. And were you prior to 1901? A. Yes, sir.

Q. Suppose that a ship of about 3,000 tons capacity was bound for Two Harbors from Superior, loaded, and it
236 was blowing from the northeast, and it was a dark and cloudy night, and the master made out as he approached the harbor, a white light on the shore and a red light on the east breakwater, and as he came nearer, he made out, from three hundred to five hundred feet west of the red light on the breakwater, a white light, and which he supposed was about twenty feet above the water, but which was actually about fourteen feet. Now in entering there, what would you say that a mariner of skill and experience would take that white light for? A. Did I understand you to say this white light was on the shore?

Q. Very near the line, three hundred to five hundred feet west, with the red light on the breakwater, just a little outside of it? A. I would take that to be some floating object.

Q. What do you think a mariner of average judgment and skill and experience would take it for? A. He would take it to be a floating object.

Q. What floating object would you have reference to—would a man have in mind? A. A boat at anchor—there are lots of launches plying around the harbor there, tow boats, such as that.

Q. What is a single white light used for if it is stationary, what is that commonly understood to mean to the average mariner in the water? A. It generally means it is a floating object, or lying at anchor.

237 Q. Have you ever seen vessels at anchor in Agate Bay? A. Not to my knowledge—I would not state that I had or had not.

Q. You know of no reason why they might not anchor there in that bay? A. No.

Q. And with a northeast wind blowing, they might drag their anchor? A. Very likely, yes, sir.

Q. What book or publication do you use to ascertain the correct location of the lights and Lighthouse business on the lakes, etc.? A. I use the Government Lighthouse book.

Q. Is it a publication, like we have here, Exhibit "1"? A. Yes, sir.

Q. Suppose that under the conditions, which I state hypothetically, a master should arrive at Two Harbors, in the night time, not knowing that there was an extension to the break-

water, and he saw on the one end a red light, on the breakwater, and a white light off four or five hundred feet, what do you say as to seamanship which would take him, under check, within one hundred feet of the red light in entering the bay, as to whether that kind of seamanship was good or bad? A. To go between the bright light and the red light?

Q. Yes. A. I think it all depends on circumstances. If he got so far that he could not go on the other side, he would have to go between.

Q. I am basing the question on the fact that he did not know there was any obstruction there. A. Either side
238 would be practical, as long as there was room there.

Q. Captain, did you ever know of a mariner going to the engineer's office for information, or to procure pamphlets which contained information? A. I myself—I don't know anybody that ever done so—never heard of it.

Q. What does a single red light stationary in a roadstead, bay, or lake, mean to a mariner?

Mr. Houpt: Object to the question on the ground that it is incompetent, irrelevant, and immaterial.

The Court: Objection is overruled.

A. In a roadstead, lake or bay?

Q. Yes. A. I could make two answers to that sir. In the lake if I would see a red light low to the water, I would suspect it to be a schooner under sail.

Q. If the light was stationary I mean? A. If it was stationary I certainly would take it to be a danger signal.

Cross-Examination

Mr. Houpt:

Q. Captain, if you were entering Agate Bay, and you saw at the end of the breakwater a red light, which you mistook for the end of the breakwater, and further out at sea, five hundred feet further, you saw a red light, which to you was a danger signal, would that in any way have prevented you from rounding this red light at a distance of seventy five feet in going into the harbor? A. Have you reference to Two Harbors?

239 Q. Yes. A. If I saw another red light further out, I would be looking out for danger, and think probably that that was the end of the Two Harbors' breakwater.

Q. But you would see the red light there? A. Yes, sir.

Q. And you knew nothing about any more construction of a breakwater? A. Yes, sir.

Q. Suppose that this red light here was the end of the breakwater, there would be nothing to prevent you going in between these two lights into the harbor? A. I don't quite get the question.

Q. Assuming that you saw a red light fixed red light at the westerly end of the east breakwater, and you supposed that was the end of the breakwater, and out further, say a distance of 500 feet you saw a red light, now that red light would not in any way prevent you rounding the breakwater in the ordinary way and going into the harbor, would it? A. Yes, sir, it would. Because I would not take it for granted that this first red light was the end of the breakwater. If I picked up my Lighthouse book and saw that the new breakwater was marked by a red light, a fixed light, just as soon as I saw that I would go around the two. I would try to get around the last red light, if possible—that is, if I thought it was on the west end of the east breakwater.

Q. What would make you think so, when you had your lighthouse book as a guide, and that book showed only one light, and that light was on the breakwater, why would you take that other light out there, being guided by your
240 lighthouse book, as the end of the breakwater, notwithstanding your signal book? A. Yes, sir.

Q. You would ignore that? A. No, sir, I would not ignore it, because my Lighthouse book would tell me that the inside light was the end of the breakwater—I have got to figure that out myself.

Q. Then if there were two lights on that breakwater you would expect to see it in your book? A. If there were two lights on the breakwater—if the Government established and put the lights there.

Q. Now then if you took the out one as the end of the breakwater wouldn't you expect to see them both on the book? A. As I would be approaching it the lights would show over that breakwater, the Two Harbor lights, would show across the breakwaters the lights of the town—I have went in there and seen the yard lights in the railroad to the eastward of the ore chutes.

Q. So you would mistake a light on the breakwater for a light on the shore? A. Not necessarily. I would go around the last red light. If I came close to it and I saw two red lights close together I would round the last red light.

Q. If you saw a white light there why wouldn't you round that? A. Because I would think that would be some floating object.

Q. Did you ever see any objects in Two Harbors lit by a red light, except the end of the breakwater? A. That is all.

Q. You never saw any objects floating out there, or any temporary object that interfered with navigation that
241 was lit by a red light? A. Not to my knowledge. I don't remember seeing any. I can't recollect seeing any lights there.

Q. If you knew that the new breakwater was under construction, three hundred feet along out from the end of the east-old-breakwater, and you saw a white light out there, what would you have done then? A. If I knew there was under construction three hundred feet away from the original breakwater.

Q. What would you have done in entering that harbor? A. I would have rounded the white light.

Q. If you had not known that that work was under construction and you saw a white light out there, about three hundred feet away from the old breakwater, what would you suppose that light meant? A. An object floating.

Q. You could not have thought that it meant the end of the breakwater? A. No, sir.

Q. You never saw breakwaters lit that way? A. Not government lights.

Q. Have you seen white lights? A. Yes, sir.

Q. You have seen white lights on work in the course of construction? A. I could not say as to that.

Q. You have never seen any obstruction to navigation lit by a white light? A. Yes, sir, I have seen obstructions lit by bright lights, yes, sir.

Q. So it don't always mean a ship at anchor? A. Not always. It don't always mean a ship at anchor; but if the obstruction is right on the water, I have reference to.

Q. This white light may have been mistaken for
242 an ore boat in the water? A. If it was low enough.

Q. The question was asked you, wasn't it, assuming a light fourteen feet high, which was mistaken for a light twenty feet high, and you said that light may have been mistaken for an ore boat? A. I don't believe I said that—I don't believe I did, sir. If it was low it would be an ore boat,

Q. If I remember your testimony you said it might be mistaken for an ore boat. A. I had reference to a bright light on anything floating. If it was as high as twenty feet, or thereabouts, I would take it to be an anchored light, if it was on any object floating.

Q. Do vessels ordinarily anchor outside of harbors or inside harbors? A. They generally try to get inside—I always do.

Q. Seeing a vessel on the outside of a harbor make any difference in your judgment about its being a vessel at anchor? A. If it was outside of the harbor?

Q. Yes. A. No, I would think it would be a vessel at anchor.

Q. Outside of the harbor? A. Yes, sir.

Q. That is where they usually anchor? A. No, sir.

Q. Is that the reason why you would take it for a vessel at anchor? A. No, vessels anchor in some queer places at times.

Q. Before you enter a harbor with which you are not familiar, do you usually try to ascertain the conditions surrounding that harbor? A. If I am not familiar with it.

243 Q. Yes. A. I certainly do sir.

Q. How do you inform yourself, what is your source of information? A. I take the chart and the Lighthouse book.

Q. Do you consult these Notices to Mariners? A. I always read these notices.

Q. And if you received a bulletin from the engineer's office you read that, didn't you? A. I always generally read them.

Q. And that is your principal source of information, isn't it? Captain, these publications that the Government sends out? A. My principal source of information is my chart and Lighthouse book.

Q. And the bulletins? A. The bulletins help. If I was going into a harbor I had never been in, I would never think of picking up the bulletin, I would pick up the chart, and if I didn't have a chart I would use my Lighthouse book.

Q. The Lighthouse book does not give you any notice of any new work going on? A. No, sir.

Q. It is important to know that? A. Yes, sir, we try to keep track of all the new work going on.

Q. It is necessary, is it not, so you may safely enter a harbor? A. I always try to keep track of it.

Q. In your opinion a man that didn't keep track of it would not be a good sailor? A. I would not pass criticism upon another man's sailing.

244 The testimony of Charles H. Frank, on the part of the defendant, given on the former trial, was read by Mr. Kremer, as follows:

Direct Examination

By Mr. Kremer:

Q. What is your full name? A. Charles H. Frank.

Q. Where do you live? A. I live in Detroit.

Q. What is your occupation? A. Master mariner.

Q. How long have you been a master mariner? A. About twenty five years.

Q. How long have you sailed altogether? A. Oh, I have sailed ever since I was thirteen years old.

Q. Where? A. On these lakes and rivers.

Q. What steamer are you connected with now? A. The steamer called the George Stone.

Q. Where does she belong? A. She is owned in Cleveland.

Q. Who is her owner? A. M. A. Bradley.

Q. Are you familiar with Agate Bay and the entrance to it? A. Yes, sir.

Q. Do you know what kind of a light had formerly been used, prior to 1901, on the east breakwater? A. Yes, sir.

Q. What kind of a light was it? A. A red light always.

Q. What book do mariners use in order to determine the color and character and location of the lights on the lakes? A. They use Lighthouse books.

245 Q. When you have no bulletin to the contrary, what do you use as guide to inform you as to these lights? A. Well, we use the book.

Q. Did you ever know of any lights being used upon works in the course of construction, pier work or breakwater work? A. Yes, sir.

Q. What kind of lights do they use on those works? A. Well, a red light.

Q. When have you seen red lights used on works in the course of construction? A. In 1882 I was employed by the Government on the Government dock at Sand Beach, a harbor of refuge.

Q. Where is that? A. That is on Lake Huron.

Q. What lights did you use there as signals for the work in course of construction on the breakwater? A. A red light.

Q. What does a single white light indicate in a harbor or bay, or in the lake? A. A vessel lying at anchor.

Q. Is there any other light ever used in conjunction with that? A. No, sir.

Q. Seeing a white light at the entrance to Agate Bay, what would it indicate to a mariner? A. It would indicate a vessel at anchor.

Q. Seeing a single red light without any accompanying light, stationary, what would that indicate? A. At that point?

Q. Yes. A. Well, it is the end of the pier. It was always our mark to keep clear of that light.

246 Q. What do you say as to the lighting up of an extension of the old pier at Agate Bay, which was lighted up on the end by a red light, by using upon that exten-

sion a white light, what do you say with reference to it being good or bad seamanship or judgment.

Mr. Purdy: I object to the question as immaterial, irrelevant, and incompetent.

The Court: That is practically the same question as the other that I have ruled on before. You can state the facts and the circumstances surrounding the place and ask whether that was a proper or an improper mode of using it.

Q. Supposing that you found as the book informed you, that the breakwater at Agate Bay was marked by a red light, and on your approach to the harbor you saw a white light distanced from that red light three to five hundred feet away, what would you do as a good seaman if you had no knowledge different from what you saw there? A. I should judge it was, I should think it must be a vessel at anchor, or some boat backing out from the harbor.

Q. How would you enter with reference to the red light, if the light as the book indicated on the end of the pier was marked with a red light? A. I should naturally suppose it was that light.

Q. In what way would you come in? A. I would expect to clear it as usual.

Q. In what way would you clear the red light? A. We used to go in with out vessels within forty or fifty feet of it.

Q. Within forty or fifty feet of the red light? A. Yes, sir.

247 Cross-Examination

Mr. Purdy:

Q. During the year 1901, this last summer, were you a master on some vessel at that time? A. Yes, sir.

Q. On what vessel? A. The George Stone steamer.

Q. Where were you running to, and between what points? A. I was running between Chicago and Ashland and Allouez Bay here and Two Harbors.

Q. You made Two Harbors, did you? A. Yes, sir, quite often.

Q. Before that time in 1900, did you make Two Harbors? A. Yes, sir, and for a good many years before that.

Q. Where is your marine postoffice? A. It is at—I have no marine postoffice.

Q. Where do you get your mail? A. Well, I get our mail sometimes here, sometimes at the "Soo", my personal mail.

Q. Did you ever get it at Detroit? A. Last year I didn't go to Detroit much.

Q. Well, I suppose you had one of these books here? A. Yes, sir.

The Court: That is the light and fog signal book?
Mr. Purdy: A. Yes, sir.

Q. You have that all the time, you get them once a year? A. Some years we didn't get them until very late, sometimes in the middle of the season.

Q. But you know that those books don't contain reports of work under construction, under the process of construction, don't you? A. Well, they do to a great extent, we follow them very closely.

248 Q. They do to a great extent? Can you tell me where there is a light mentioned in any one of these books that is on any work under process of construction during the year, any work under process of construction at the time the book was issued? A. Well, possibly, I think not. No, sir, not from memory.

Q. You receive these Notices to Mariners, do you not? A. Well, once in awhile, yes, sir.

Q. What do you mean by once in awhile? A. We get them sometimes. Sometimes we get them every trip, and then we don't get them for a month.

Q. But you get them off and on during the summer? A. Last year we didn't get any.

Q. Last year you didn't get any? A. No, sir.

Q. 1901? A. Not until fall.

Q. Not until fall? A. No, sir.

Q. How was that? A. I didn't trade down below.

Q. You didn't? A. No, we traded between Chicago and here.

Q. So you didn't get them? A. Usually our owners send them to us. They send them to the Cleveland office and they sent them to us.

Q. Your owners didn't send them? A. No, sir, they sent them to Detroit, to the postoffice there.

Q. You know, do you not, that these Notices to Mariners, are really requisite to a mariner, and that a mariner is supposed to be posted on them with regard to the harbor he is entering so as to know what improvements there are going on? A. Well, I don't know, we pay no attention to them, I don't pay

249 any attention to them at all.

Q. You don't pay any attention to them at all? A. No, sir.

Q. You don't? A. No, sir, not the slightest.

Q. You just simply go according to what you see? A. According to my experience.

Q. According to your experience? A. Yes, sir.

Q. From what you see? A. Yes, sir.

Q. If you should not know that the breakwater at that time was in process of construction, or if you should happen to be in a harbor, and there should happen to be work going on on a breakwater it would be your own lookout, wouldn't it? A. Yes, sir.

Q. And you take your chances on that? In other words you take your chances that you do not know what is going on? A. Yes, sir.

Q. Is that right? A. Oh, yes, these reports come in occasionally but we don't pay any particular attention to them.

Q. Did you always round the red light when you went into a harbor? A. I couldn't get in any other way.

Q. How many times did you hit the breakwater? A. How many times did I hit it?

Q. Yes. A. I don't know of any time that I hit that or any other breakwater.

Q. So you happened to round that breakwater three hundred feet from the light, the red light? A. Three hundred feet?

Q. Yes. A. I didn't say I did.

Q. Well, I will ask you. I call your attention to this map, Exhibit "A", you say you went into Agate Bay during
250 the summer of 1901? A. Yes, sir.

Q. And you saw these improvements going on there? A. Yes, sir.

Q. That three hundred feet on the breakwater? A. I saw there was some work going on there.

Q. How did you go into the harbor when you had occasion to go in there? A. I went round the same as we always went, leaving the red light on the starboard side going in.

Q. You couldn't go in naturally within eighty feet of the red light? A. At night time I don't think you would, no.

Q. In the day time would you, when these cribs were in there? A. I never saw cribs there.

Q. You never saw cribs there? A. No, sir, only those they were sinking; I suppose the red light was always at the end of these cribs.

Q. How near do you go to the red light at night? A. I don't know where the red light was, only I saw the structure there.

Q. Did you ever go in there at night? A. Yes, sir.

Q. You saw the red light? A. Yes, sir.

Q. How near the red light did you go? A. That time I went in there I came from Duluth, and I wouldn't have to go near it.

Q. You wouldn't have to go near the red light? A. No, sir.

Q. You would go in this way? A. Yes, sir.

Q. You didn't go way down the lake, and then go round as Captain McAvoy testified he went? A. It depends on the weather.

251 Q. Did you ever go in that way, the way Captain McAvoy said he went in? A. Yes, sir.

Q. You have? A. Yes, sir, often.

Q. Often? A. Yes, sir.

Q. When was that you would go in that way? A. When the wind was blowing a gale from the northeast I came in and had to let go an anchor.

Q. How near the red light did you go at that time? A. I came in so I thought I was going to hit it.

Q. You thought you were going to hit it? A. Yes, sir.

Q. Don't you know there were six cribs in there at that time? A. I went on for all that.

Q. Don't you know that there were six cribs in that last summer? A. I don't know how many cribs there were.

Q. Over three hundred feet out from this place? A. I don't know how many there were or how far they were out.

Q. Did you go within three hundred feet of the red light? A. I don't know.

Q. You don't know? A. No, sir, I don't.

Q. Did you see a white light at the end of the pier? A. I don't remember ever seeing a white light there.

Q. You don't remember that? A. No, sir, I don't.

Q. What light did you steer by? A. Used the old light.

Q. How near did you go to it? A. Well, it would be pretty hard to tell. I gave it a fair berth always.

Q. What do you mean by giving it a fair berth?

252 A. Well, I supposed it was at the end of the pier.

Q. I didn't ask you that. What do you mean by a fair berth? You said you gave it a fair berth. How many feet away did you go? How many feet did you give? A. Well, that depends on your vessel. I should think that three hundred feet would be a fair berth.

Q. Well, did you give it two hundred or three hundred feet? A. Well it depends upon circumstances of course.

Q. I am asking you about this last summer, June, July and August. A. Well, I will tell you. Last year I don't ever remember going in there at night.

Q. You never went in there at night? A. I don't believe I ever went in there at night.

Q. Do you mean to say that you don't remember going in there last year at night? A. I remember always that at the end of the pier there was a structure there for a light.

Q. Didn't you say sometime ago that you had been in there several times last summer at night? A. No.

Q. Do you say now you didn't go in there last summer at night? A. I don't believe I did.

Q. How many times did you go into that harbor last summer altogether? A. Oh, I was there probably four or five times.

Q. Not more than four or five times? A. No, sir, I think not.

Q. And none of those times did you go in at night? A. I don't remember I did.

253 Q. Not that you can remember? A. No, sir.

Q. So you didn't have occasion to see the red light or the white light or anything else there? A. Yes, sir.

Q. And the times you went in there last summer were when you were coming from Duluth? A. Yes, sir.

Q. And you went in this way? A. Yes, sir.

Q. You say that in 1882 when you were working for the Government on Lake Huron you saw a red light on work under construction? A. Yes, sir.

Q. How long did you work for the Government? A. Just a year.

Q. Just a year? A. Yes, sir.

Q. Since that time have you seen any red lights on work under construction? A. Yes, sir.

Q. Where? A. In Buffalo.

Q. Any place else? A. I think in Chicago.

Q. When did you see the red light at Buffalo? A. The year before that.

Q. The year before when? A. The year before last.

Q. Where was that? A. At the south breakwater.

Q. On the south breakwater? A. Yes, sir.

Q. Was that after it was completed or before? A. They were working on it. They were extending the crib and pier work.

Q. Was the red light on the old breakwater or on the new breakwater? A. It was on the south gap.

Q. On the old breakwater? A. Yes, sir.

254 Redirect Examination

Mr. Kremer:

Q. Do you know whether you got any of those bulletins last year, you say you didn't get all of them? A. I don't know. They seem to be very careless about sending them to us.

Q. Sometimes they would come, I suppose? A. Yes, sir, sometimes they would come, and sometimes we wouldn't get them for months.

Q. You didn't receive these? A. I didn't receive them last year.

Recross-Examination

Mr. Purdy:

Q. You say your owners seemed to be very careless about sending them to you? A. Well, they didn't send them to us any way.

Q. I want to ask you if you have not seen a white light on a pier or upon land, as a light to steer by, marked in this book? A. On the end of the pier?

Q. Yes. A. On the end of a pier as a Government light?

Q. Yes, as a Government light. A. Yes, sir, there is a good many lights in houses.

Q. And there are some not in houses, are there not? A. Yes, sir.

Q. Then every high light you see you don't take it for a vessel at anchor? A. No, sir, we don't take lights that are revolving.

255 Q. They are not all revolving lights? A. No, sir.

Q. Are these revolving lights like the white lights we have been speaking about? A. No, sir, they are larger lights.

Q. They are larger lights? A. Yes, sir.

Q. On page 76 of this book it says there is a light on Superior pier on the front end of the south pier, are you acquainted with that light? A. Yes, sir.

Q. What is that light? A. It is a bright light.

Q. A white light? A. Yes, sir.

Q. A fixed light isn't it? A. Yes, sir.

Q. It isn't a revolving light? A. No, sir.

Q. You don't take that for a ship at anchor, do you? A. No, sir, certainly not.

Q. Why not? A. It is high up.

Q. How high is it? A. I don't know just exactly the height but it is a white light. It is a government lighthouse. It is a large light,—it is supposed to be some eighteen to twenty miles.

Q. How high is a ship at anchor light? A. Probably twenty feet.

Q. Possibly at fifty feet, isn't it? A. An anchor light?

Q. Yes, a ship at anchor light. A. Well, it depends on the size of the vessel, and what the vessel is.

Q. Where is it usually put? A. It is usually put about fifty feet, but some vessels don't have it as high as that.

256 Q. That fixed white light at Superior, given on page 78 of this book that you say you use, it says the light is ninety feet high. A. I don't know just the height of that light.

Mr. Purdy: I will offer in evidence page 78 of this book.

Mr. Kremer: I object to it because it is entirely immaterial. It cannot be important as to the height of these white lights in a lighthouse.

The Court: It does not seem to me it is material. It is admitted that white lights are used in lighthouses, and of course that is an entirely different light. I do not see how the height of a particular light at a particular place is immaterial in this matter.

Mr. Purdy: But it is in testimony that this light at Two harbors, was a large powerful white light, and that it was used on that work that night.

The Court: I do not think it is material. The objection will be sustained.

Counsel for plaintiff excepts to the ruling.

Q. Isn't it a fact that Rule 9, of Sailing Regulations provides that vessels when at anchor shall carry a white light that shall be visible not to exceed twenty feet above the hull of the vessel, a white light? A. Yes, sir. The moment you let go your anchor they go to work and take out the lights, the green and red lights and the mast head lights, that is his first duty to put out his harbor light.

Q. The anchor light should be about twenty feet above the level of the deck? A. Yes, sir, that is the only
257 light which is allowed. There may be some smaller lights of course [perhaos] in the cabins.

Q. Do these lights vary on different vessels, as to the size of the anchor light? A. Well, they are generally six or eight inch lights, something like that, sometimes more; but as a rule they are six inch lights, possible about that big around. (Indicating).

Q. As to the distance you can see a light, it depends upon the size of the light and the atmosphere? A. Yes, sir.

The testimony of Christopher Cox Allen, on the part of the defendant, given on the former trial, was read by Mr. Kremer, as follows:

Direct Examination.

Mr. Kremer:

Q. What is your occupation? A. Master mariner.

Q. How long have you been a master mariner? A. About twenty seven or twenty eight years, something around that.

Q. Where have you sailed? A. On the upper lakes.

Q. What vessel are you in now? A. The Castalia.

Q. Where does she belong? A. Cleveland.

258 Q. Whom does she belong to? A. Brown Company.

Q. What does a mariner understand by a single white light at sea, or in a bay, or in a harbor, what does it indicate to a mariner? A. An anchor light.

Q. Is there any other light than a white light used for that purpose? A. No, sir, not that I know of.

Q. What is the usual height that anchor lights are carried? A. About forty to fifty feet. It all depends upon the height of the mast of a vessel. Usually a white light is shown to show round the horizon.

Q. So it will show clear of any obstruction on the vessel? A. Yes, sir, clear of any obstruction on the vessel.

Q. What does a single red light indicate in a harbor or a bay? A. A pier or a breakwater, or any obstruction.

Q. What is a red light used for otherwise as a signal? A. On board of a vessel.

Q. Is it ever used alone? A. No, sir, not that I know of.

Q. What lights are used in connection with it on different vessels? A. A bright light. It all depends whether you have a tow. If you have a tow you have two bright [loghts]. Then you have a red and a green light, and a white aft.

Q. Does a red light on a vessel indicate whether she is in action or stationary? A. She is supposed to be under way, except along by a dock, if we lay there any length of time we usually put our colored lights out.

259 Q. Are you familiar with Two Harbors? A. I have been there several times.

Q. What book or publication do you use to aid you in determining the location and character and color of the lights used on the Lakes? A. A book, the Government Lighthouse book.

Q. Is this the one (showing book to witness)? A. Yes, sir.

Q. This is the book you use? A. Yes, sir.

Q. That is an annual book? A. Yes, sir, an annual book.

Q. When do you get them usually A. Sometimes in the fore part of the season, sometimes they are a little late in getting them out.

Q. To what extent do you rely upon the information in that book A. Whenever I go out, whatever port I go to, I generally take a look at the book.

Q. How much do you rely upon it? A. We take it for granted.

Q. You take it for granted? A. Yes, sir.

Q. Do you know what kind of a light was put on the east breakwater at Agate Bay? A. At Two Harbors?

Q. Yes. A. Why there used to be a red light there.

Q. There used to be a red light there? A. Yes, sir.

Q. Did you ever hear of a bright light being used at night there?

Objected to by counsel for plaintiff as immaterial, incompetent and irrelevant.

A. I never did.

The Court: I suppose it ought to be confined to the
260 year when the accident occurred.

Q. Prior to the 24th of July 1901? A. I couldn't say. I was in there early in the spring. I wouldn't be certain; I was there only once last summer.

Q. Supposing you were entering the harbor of Two Harbors at night, it was a dark night, and you saw a red light, and if in your book you found that a red light marked the end of the breakwater, and suppose some three to five hundred feet away from that you saw a single white light, what would these lights indicate to you in approaching the harbor at that time? A. Something lying there at anchor, or a light on the shore.

Q. How would you round that breakwater in going in? A. It would all depend upon the wind, which way the wind was when I was going in.

Q. Suppose the wind was northeast and fresh? A. I would run by past the harbor and then move up. You understand with the wind that way you have got to have a good deal of room.

Q. How would you enter with respect to the white light and the red light? A. It would place a man in a very queer position. I wouldn't know what it was, that white light. I would keep the red light just aboard.

Q. How close would you go around? A. Unless I knew something was there, fifty feet or a hundred feet or a hundred and fifty, something like that.

Q. What would you take such a white light for at that time and place? A. I would take it for a ship. I couldn't
261 tell very well at night. It might be a vessel lying at anchor, or it might be some steamboat working in.

Cross-Examination

By Mr. Purdy (read by Mr. Houpt):

Q. During last season, during 1901, where were you running? A. I was pretty near all over the lakes.

Q. Did you go to Agate Bay? A. I think I did go in there once—I think so.

Q. Once. A. Yes, sir.

Q. How many times were you in here, in Duluth? A. I don't know I was in here last year, although I was in Allouez Bay.

Q. Where else did you go? A. I went to Ashland, Marquette, and Escanaba.

Q. You say you were only here in Duluth, once? A. Yes, sir, once.

Q. How many times were you in Escanaba? A. Once.

Q. Where did you go from this place down Lake Superior, to what point? A. I went to Lake Ports.

Q. What time were you at Two Harbors? A. I can't tell you, I think it was some time in the spring. I don't know exactly.

Q. How early in the spring? A. Some time in May I guess.

Q. What time did you go there, night or day? A. That I don't know. I would have to refer to the log.

Q. You don't remember about it? A. No, sir.

262 Q. Were you in there the year before that? A. I was.

Q. How many times? A. I couldn't tell you.

Q. More than once? A. Yes, sir.

Q. Were you in there this year? A. No, sir.

Q. You have not been there this year? A. No, sir.

Q. Did you see these improvements going on when you were in there? A. No, sir.

Q. You have no recollection about these improvements? A. If I did see it, I don't recollect it.

Q. You have no recollection about it? A. I know they were making improvements, or intended to.

Q. How did you know that? A. By hearsay.

Q. By hearsay? A. Yes, sir, reading some papers.

Q. When did you first hear about it? A. They have been working there for quite a while.

Q. For two or three years? A. Yes, sir.

Q. Do you get these bulletins or notices? A. Yes, sir.

Q. Did you get them? A. Yes, sir.

Q. And you read them? A. Of course I did, yes.

Q. So you knew about that? A. Yes, sir.

Q. Then if you were entering Agate Bay in July, 1901, and saw a red light, and your book here, the Lighthouse book gave you a red light at the end of the breakwater, knowing the improvements were going on, you wouldn't have rounded by that red light? A. I would suppose that they had out a red light at the end of the extension.

263 Q. Even while they were building the breakwater? A. Yes, sir.

Q. Did you ever see a red light upon a breakwater that was being built? A. Yes, sir.

Q. Where? A. At Ashtabula harbor, the breakwater at Ashtabula.

Q. Where on Lake Superior? A. Well, at Portage entry.

Q. You saw a red light there? A. Yes, sir.

Q. When the breakwater was being built? A. It wasn't a breakwater, it was a pier.

Q. It was being built? A. It was finished, I guess. That was the only time I was there.

Q. Do you know whether it was being built at the time you saw that red light there? A. I passed in the night time. I couldn't tell you anything about that.

Q. But you saw the red light on the pier? A. Yes, sir.

Q. Do you know of any other Government improvement that while it was going on there was a red light put on it? A. I think at Conneaut.

Q. Where is that? A. Lake Erie.

Q. When did you see that one? A. I don't know. I think it was last year, but I wouldn't be certain.

Q. Any place else? A. Ashtabula.

Q. Where did you see that? A. On the southerly crib.

Q. While they were still building on it? A. It was just at the top of the rocks out of the water. They had a fog bell there and a red light.

264 Q. Any other place? A. I don't know of any other.

Q. How many places have you seen where there was a white light on them. A. Quite a number.

Q. You know it is quite a common thing to light Government works with a white light? A. Government works?

Q. Yes, a white light on Government works? A. Not in my days of sailing.

Q. That is true today, isn't it? A. Yes, but not for the last twenty five or thirty years.

Q. You have been in the harbor of Duluth in the last two years? A. Yes, sir.

Q. Did you ever see a red light on these works that were going on here, while these improvements were being made? A. I don't know what light they had on the improvements. The time that I was up there, I was in there in the day time.

Q. Have you never been here at night when they were improving this place, making these improvements here? A. No, sir, but I know there is a red light there.

Q. You know there is a red light at night, a red light at the end of the pier? A. Yes, sir.

Q. Did you ever see a red light upon the improvement here in Duluth, while it was going in, while it was under process of construction? A. No, sir, I was not in here.

Q. These red lights you spoke about on this breakwater at night, at Portage, was that when it was being built, some twenty years ago? A. Maybe thirty years. I just
265 told you I was only there once at Portage and saw a red light. I went in there in the day time.

Q. Was not that the old pier? A. I don't know whether it was old or new.

Q. I ask you when it was? A. I don't know when, I couldn't tell you.

Q. I asked you first this question, whether you had ever seen a red light upon any work that was under process of construction, and you told me you had at Portage. Now you say you don't know. A. I told you I did. I said I didn't know whether it was finished or not. I said when I came up to Duluth, I said I knew there was a red light there.

Q. I thought you said there was a red light on the pier at Portage? A. Yes, sir, there was, but I said I didn't know whether it was finished or not. You picked me up quite quick when I said there was a red light on the pier, but whether it was finished I didn't know.

Q. You don't know whether it was finished or not? A. No, sir, I don't know that.

Q. Don't you know that that pier was finished twenty years ago, that pier at Portage? A. No, sir, I don't know anything about it.

Q. You don't know anything about it? A. I know the other one was only the year before last.

Q. Did you see the new breakwater there at Portage? A. At the upper end?

266 Q. What is called the new breakwater at Portage? A. I saw part of it, that is the upper end. I don't know there is any breakwater down below.

Q. It is outside? A. Which end, the upper end or the lower end?

Q. The upper end. A. I saw the breakwater there.

Q. Did you see a red light on that? A. I came out of there in the day time.

Q. You know that this Light and Fog signal book that you say you have was always used? A. Yes, sir.

Q. And that these notices to Mariners as issued are supplementary to this book? A., Yes, sir.

The testimony of George M. Wise, on the part of the defendant, given on the former trial, was read by Mr. Kremer, as follows:

Direct Examination

Mr. Kremer:

Q. What is your name? A. George M. Wise.

Q. Where do you live? A. Buffalo.
Q. What is your occupation? A. Marine Engineer.
Q. What steamer are you marine engineer of now? A. Well, a year ago I was on the steamer Shenandoah.
267 Q. At the time of the collision of the steamer Shenandoah with the breakwater at Agate Bay, what vessel were you on then? A. I was on the Shenandoah.
Q. In what capacity? A. Chief Engineer.
Q. Were you on watch at the time of the collision? A. I was.
Q. What was the last signal that yoa got before the collision? A. Two bells.
Q. What does that mean? A. Back up strong.
Q. Where were you when you got the signal? A. I was about three [fett] from the throttle.
Q. From the throttle? A. Yes, the main throttle on the steam pipe.
Q. That is the main throttle that controls the engine? A. Yes, sir.
Q. How far do you say yeu were from the throttle? A. About three feet, I could reach and shut the throttle.
Q. How much steam were you carrying? A. A hundred and fifty five pounds.
Q. How much were you allowed? A. One hundred and sixty five.
Q. What speed was your engine making at the time when you got the order to go back? A. When we were backing, when I got the last two bells?
Q. What order had you had for backing? A. Previous to that?
Q. Yes. A. Two bells to back.
Q. Two bells to back? A. Yes, sir.
Q. Did you obey that order? A. I did.
268 Q. How far were you from the throttle when you got that order? A. I was about the same distance, one step, not to exceed three feet.
Q. How long did it take you to reverse your engine when you got that signal? A. About a second and a half.
Q. What did you do? A. I threw over the reverse lever and pulled my throttle.
Q. What number of turns was your engine making when you got the signal to go back? A. I should judge it was making between thirty eight and forty.
Q. What was her full speed? A. Her full speed would be eighty-two.

Q. How long before you got the signal to back up had you got the order to reduce speed down from eighty-two to forty, to get the revolutions from eighty-two to forty? A. About thirty minutes.

Q. About thirty minutes? A. Yes, sir.

Q. What speed were you going at the time you got the order to back up? A. Oh, I think we were going about four and a half to five miles [and] hour.

Q. When you got the order to back? A. Yes, sir.

Q. So you were going about four or five miles an hour when you reduced your speed and what speed were you going when you got the order to back? A. I should judge she was going between four and five miles an hour, somewhere along there.

269 Q. When you got the order to back you say you threw the reverse lever over [abd] pulled your throttle? A. Yes, sir.

Q. That means you gave her steam? A. Yes, sir, gave her a full throttle.

Q. When you gave her a full throttle to make her back how many revolutions would she make? A. I should judge when she got her headway going back she was making somewhere about ninety to ninety five.

Q. Was there anything more that you could do than to back her strongly to avoid a collision? A. No, sir.

Q. Did you feel any jar of any collision or any shock? A. Yes, sir, I felt a little jar.

Q. How much of a jar did you feel? A. Not very great.

Q. What were you doing when you felt it, where were you? A. I was standing with one hand on the lever.

Q. Did it have any effect upon your position? A. No, sir, not a particle.

Q. What do you say as to whether the steamer had lost any or all of her headway at the time you felt that jar? A. Well, I should judge she had lost the biggest part of her headway.

Q. You couldn't see anything of what was going on on outside? A. No, sir, we were closed in and we can't see anything.

Q. What kind of an engine has the steamer? A. Triple Expansion.

Q. As to her ability to take care of that boat? A. She had good ample power.

Q. How about her boiler capacity? A. She has got good boilers too.

270 The testimony of H. W. Richardson, on the part of the defendant, given on the former trial, was read by Mr. Kremer:

Direct Examination.

Q. What is your name? A. H. W. Richardson.

Q. What is your business? A. I am in charge of the United States Weather Bureau.

Q. How long have you been in charge of the United States Weather Bureau Office? A. Sixteen years.

Q. What office were you in charge of on July 24th, 1901? A. Duluth.

Q. Are the records of your office such that you can tell now what the wind was on the 24th of July, 1901? A. Yes, sir.

Q. Are the records of your office such that you can tell what the velocity of the wind was as it was here at any given hour of the day? A. Yes, sir.

Q. Are the records of your office such that you can tell whether the atmosphere was obscure and whether the night was cloudy or clear and open? A. Yes, sir.

Q. You can turn to your record for the 24th of July, 1901, do the records of your office enable you to state what the condition of the weather was as far as Two Harbors? A. Practically the same conditions would obtain at Two Harbors as at Duluth.

Q. With reference to the direction of the wind you may turn to your records and state to the Court and Jury
271 what the direction of the wind was on the 24th of July, 1901, between eleven and twelve o'clock P. M. that day? A. Northeast.

Q. How long had it been blowing from the northeast? A. All day.

Q. What was the velocity of the wind between eleven and twelve o'clock at night? A. Twenty-eight miles.

Q. Twenty-eight miles an hour? A. Yes, sir.

Q. What [—] been its velocity during the afternoon and early evening? A. The velocity ranged anywhere from twenty to thirty miles an hour, at times it was a little more.

Q. Was it a clear night or a dark night? A. It was cloudy.

Q. What kind of a wind would you call that as to severity and strength? A. A brisk high wind, brisk high.

Q. What is the true velocity of the wind that you described? A. Of course it is quoted from the actual records made each hour, the actual number of miles each hour. The rate is sometimes higher than the average velocity for an hour. This is the number of miles, the rate in an hour.

Q. Is that just the indicated or the corrected velocity that you gave? A. It is the indicated velocity.

Q. What is the corrected velocity? A. I couldn't say just at this moment. I will have to make certain corrections for it.

Q. Is it more or less? A. I couldn't say just at this moment.

Q. How much more would it be liable to vary from that? A. It all depends on the application your question would have to the general velocity.

272 Q. I want to get at the true velocity of the wind. A. As far as I know, that is the true velocity of the wind.

Q. As far as you know? A. Yes, sir.

Q. That is what is commonly understood as the true velocity of the wind at that time, is it? A. Yes, sir.

Q. There are not many corrections that would be made in your estimate that would materially reduce that velocity? A. No, sir.

Q. No trouble with the instrument that would reduce it? A. No, sir, not at that time.

Q. Not at that time? A. No, sir. The instruments were working all right.

Court is now adjourned until 10 o'clock A. M. the next day, at which time the case is proceeded with, as follows:

273 John Krey recalled on the part of the defendant, testifies as follows:

Q. How much of the time did you spend at the work while it was in progress at Two Harbors? A. Practically my entire time.

Q. Do you remember the fact of moving or having moved the red beacon light, the stationary light at Two Harbors on the old pier? A. Yes, sir.

Q. Do you remember now about what distance you moved that light back from the end? A. About thirty feet.

Q. About thirty feet? A. Yes, sir.

Q. Did you communicate that fact to Captain Gaillard your superior officer? A. Yes, sir.

Q. Now I will ask you whether or not there was any disaster or collision by reason of the moving back of that light.

Mr. Houpt: I object to this as immaterial, incompetent and irrelevant, and as being no part of this case, and also as calling for the conclusion of the witness in relation to some other collision or accident that may have occurred, which was not connected with this accident in question.

Mr. Kremer: The object of the testimony is to show that any movement there of a light for any addition to any structure, is full of danger to shipping; and even the moving of a light thirty

feet back resulted in a collision between a steamer that was coming into Two Harbors and the breakwater. It is more to illustrate the necessity of taking extreme precaution, be-
274 cause of the extraordinary danger that there is to shipping at that particular point.

The Court: I think that is a matter which has nothing to do with this case. I do not think any other accident, or the happening of any other accident with which this witness might have been acquainted is competent evidence. I think the objection should be sustained. I think the jury can take notice that the moving of a light is a dangerous thing, without any testimony of this witness to that effect.

Mr. Kremer: But it is in evidence that this accident occurred some 135 feet out at sea.

The Court: I do not think that any accident happening no matter what this witness may think was the cause of it, is competent testimony.

Mr. Kremer: We will take an exception to your honor's ruling.

The Court: Very well.

Mr. Kremer: Have you the letter that we were inquiring about?

Mr. Houpt: I have produced some letters. I think this is it.

Mr. Kremer: I think so.

Q. Will you look at the letter now handed you and state whether or not that is the letter written by you to your superior officer on the date mentioned therein. A. Yes, I recognize the letter. I can't say whether I wrote it on that date, but I guess it is all right.

Counsel for defendant offers said letter in evidence.

275 Mr. Houpt: The offer of this letter is objected to as immaterial, incompetent and irrelevant. The letter speaks about moving the red light back thirty or thirty-five feet, which is admitted; and it mentions the display of the white light upon a pole fourteen feet tall at the end of the new break water, which is also admitted. I do not see how this letter can be material to this case. The letter is simply written by a subordinate to his superior officer in connection with the construction of this breakwater. It does not in any manner change the issues, and it does not throw any additional light upon this case.

Mr. Kremer: The object is to show, as much as anything, the time when this light was moved, and the time when this other light was displayed, on May 25th, and as evidence that from that time down to the time of this disaster they had an opportunity to make publication and give notice.

The Court: I think this admission may be entered, and with that understanding I think the letter is not competent evidence.

Counsel for defendant excepts to the ruling.

Q. Did you notify Captain Gaillard your superior officer of the moving of the red light there at Two Harbors? A. You mean that it was to be moved or that it had been moved?

Q. That it had been moved. A. Some time the latter part of May 1901.

Q. When did you notify him for the first time that a
276 powerful white lantern fourteen feet from the water line, when the work progressed, was also displayed? A. About the same time.

Q. Was that, as a matter of fact, the 25th of May 1901? A. I believe it was.

David J. Girard, a witness produced and sworn on the part of the defendant testifies as follows:

Examination in Chief

By Mr. Kremer:

Q. What is your full name? A. David J. Girard.

Q. What is your occupation? A. Master of a steamer.

Q. What steamer are you at this time master of? A. The Henry H. Brown.

Q. What is her tonnage? A. Gross tonnage do you mean?

Q. Yes? A. 2670.

Q. How long have you sailed on the lakes? A. Forty years.

Q. Are you familiar with Agate Bay and Two Harbors? A. Yes, sir.

Q. And were you so in the years 1899, 1900 and 1901? A. Yes, sir.

Q. How did you become familiar with that place? A. By carrying ore from there.

Q. Have you at any time during your trading,—how many years did you trade up and down? A. Off and on about thirteen years.

277 Q. Have you at any time seen vessels at anchor in the neighborhood of that Bay or at the entrance of the Bay? A. Yes, sir.

Q. What lights did these vessels there at anchor display in the night time? A. A bright light.

Q. To a mariner arriving off the port of Agate Bay, say in the year 1901, seeing a white light, a stationary white light from three to five hundred feet away from the stationary red light, and at that time without any information of any ob-

struction or other light at that point; what if at that point he saw a white light, would the average mariner take that light to mean or to represent?

Mr. Houpt: I object to this hypothetical question, because it is not based upon anything which the counsel has a right to assume.

* * * * * * * * *

The Court: The Captain of the ship testifies that he didn't know of these things. I think it is competent for this witness to testify as to this, because one of the questions will be whether, even with the knowledge he had, whether he managed the ship as he should have done, and the other question will be whether as an ordinary prudent and careful man,
278 he should have had knowledge of these things and of these different publications which are shown to have been issued. I think it is competent for this witness to testify as to what a mariner would do if he was in the condition that this mariner was in. He has a knowledge of this place, and he went into that harbor as he has testified. I think the evidence is proper and you may examine the witness upon that point.

Counsel for plaintiff excepts to the ruling.

Q. To a mariner arriving off the Port of Agate Bay, say in the year 1901, seeing a white light, a stationary white light from three to five hundred feet away from the stationary red light, and at that time without any information of any obstruction or other light at that point; what if at that point he saw a white light, would the average mariner take that light to mean or to represent? A. I should consider it to be a vessel lying at anchor, and that I should be justified in taking the other side of it, and in going into the harbor.

Q. What publications do mariners generally consult in navigating the lakes, for the purpose of ascertaining what lights are displayed in the harbors and other places that they are liable to come near? A. The H. O. Publications, which are issued once in awhile and are sent out.

Q. What do you mean by H. O. Publications? Do you mean the hydrographic office publications? A. Yes, sir, the Hydrographic office publications; we get them at times. We get the Hydrographic papers issued at times. We never get them until the things that they relate to are put up, generally.

279 Q. Is there any book published which shows the lights and fog signals of the United States? A. Yes, sir, it shows them all?

Q. You have that book? A. Yes, sir.

Q. Do you ever consult it? A. Yes, sir.

Q. I show you now Exhibit 1, state whether that represents the book you mention? A. Yes, sir, that is the light and fog signal of the United States.

Q. What to a mariner in a Bay like Agate Bay, what would a single stationary red light indicate?

Mr. Houpt: I object to this as immaterial, incompetent and irrelevant, and as calling for the conclusion of the witness as to what a red light might indicate. There is no red light involved in this case.

The Court: There was not any red light here. You claim that a red light indicates danger and a white light does not?

Mr. Kremer: That is right.

The Court: I think he may answer the question.

Mr. Houpt: It is claimed that there is no law or rule regulating or governing the placing of this light.

Mr. Kremer: That is conceded.

Mr. Houpt: This witness is asked to state what a red light would indicate. That is the opinion of this witness. The question is was it the custom to display lights for certain purposes? The witness has testified that a white light is displayed by a ship at anchor. That is governed by regu-
280 lation. If he were asked as to the custom of placing a red light it might be competent, but to ask this witness what a red light may indicate, in the absence of any custom or rule or regulation I think it is not competent in this case.

The Court overrules the objection, and counsel for the Government excepts to the ruling.

Q. What to a mariner in a bay like Agate Bay, what would a single stationary red light indicate? I mean outside of a regular Lighthouse light.

The Court: I am inclined to think that the position of the District Attorney is right upon this question. I think the objection should be sustained.

Mr. Kremer: Our position in the first place is, that we have no notice of any light and next, that the light that was there independent of any notice, would be no notice at all, but would be worse than no notice, because it would be a misleading notice. If without giving any notice whatever of this light, the Government had seen fit to use a red light, then, without notice, a red light to a mariner would indicate danger.

The Court: I hardly think this is the right way to get at it. It does not necessarily follow that because a red light is a sign of danger, that there might not be other lights which

are also signs of danger. I think the best way to get at it is to find out what the customary display of lights is on the lakes in cases of obstruction, and then let the jury draw their own conclusions as to what a mariner should do. I think the objection will be sustained.

281 Counsel for defendant excepts to the ruling.

Q. What kind of lights are used on the lakes to notify mariners of dangerous obstructions in the way of navigation? A. Red lights, universally so.

Q. In your judgment as a mariner, which is the better light to indicate an obstruction, a white light or a red light?

Mr. Houpt: I object to this question as immateral, incompetent and irrelevant and as calling for the conclusion of the witness.

The Court: I think that is a question, after we get the facts, that the jury can judge of as well as anybody. The objection will be sustained.

Counsel for defendant excepts to the ruling.

Cross-Examination

By Mr. Houpt:

Q. You have during the time you have sailed the lakes, entered all of the harbors and ports on Lake Superior, I suppose. A. All of them? No, Sir; not all of them.

Q. Which have you been in? A. I have been in Portage canal and Portage River, Ashland, Superior, Duluth, Two Harbors, Port William, that is about all, I guess on Lake Superior. That is all I think of now.

Q. Did you ever enter a harbor at the time the government was constructing harbor work, such as piers, breakwaters, and so forth? A. Yes, sir.

Q. Did you ever see lights displayed upon the work while it was under, or in the course of construction? A. Generally red lights; that is all I ever noticed.

Q. Did you ever see any lights displayed? A. Red

282 lights, I should say.

Q. Will you please answer my question: you have seen them? A. Yes, sir.

Q. Did you see lights displayed here at Duluth? A. In Duluth, in this harbor?

Q. Yes. A. I don't remember ever seeing any in Duluth.

Q. You don't remember that? A. No, sir.

Q. Did you ever see red lights displayed here in Duluth, upon the work in the course of construction. A. Well, I can't say that I did.

Q. Did you see a red light displayed at any time on the work in the course of construction at Two Harbors? A. Yes, sir.

Q. On the temporary work, that is, temporary lights? A. I suppose they were both temporary lights that I seen.

Q. When you speak of lights do you have reference to fixed lights, lights under the supervision of the Lighthouse Board, or have you reference to the lights that the contractors display while they are doing the work? A. I hardly catch that question.

Q. You know there is such a thing as fixed lights? A. Yes, sir. There are lots of fixed lights.

Q. And there are permanent lights? A. Yes, sir.

Q. Those are lights that are under the supervision and control of the Lighthouse Board, are they not? A. A fixed light is a stationary light.

Q. Then there is also a light which you call a temporary light? A. Yes, sir.

Q. That is a light that is used or displayed upon work while it is being constructed? A. Yes, sir.

283 Q. That is the light you are talking about? A. Yes, sir.

Q. That is the light we are talking about? A. Yes, sir.

Q. A temporary light? A. A temporary light, yes, sir.

Q. Where did you see round these harbors on Lake Superior temporary red lights displayed? A. On the breakwater at Two Harbors, at the end of the breakwater at Two Harbors.

Q. At the end of the breakwater at Two Harbors? A. Yes, sir, before this work was commenced.

Q. Before the extension was commenced? A. Yes, sir.

Q. Was that light at the end of the breakwater at Two Harbors, was that a permanent light? A. It was a permanent light; no, it was not a permanent light. It was just to mark the end of the breakwater where the work was completed.

Q. Was it a light that you find in your book of light and fog signals? A. Yes, sir.

Q. As a mariner, don't you know it is only permanent lights that are found in that book? A. No, sir, not always so.

Q. Have you never learned that? A. I couldn't say that they were.

Q. Then as a mariner you did not know, and you do not know now that the lights that appear in that book, defendant's Exhibit "12 are lights that are placed there by the Lighthouse Board? A. Yes, sir, I understand that they are.

Q. You understand that they are? A. Yes, sir.

Q. Don't you understand that the red light there at Two Harbors which you spoke about was a light mentioned in that book? A. Yes, sir, the red light.

Q. It was not a light put on a pole and displayed
284 there, a light that was put there temporarily? A. It was put there temporarily, yes, sir.

Q. But the light you saw then was not upon the work that was just being built? A. How is that?

Q. But the light you saw then was not upon the work that was just being built. The red light you saw at Two Harbors, was not upon the new work, but it was upon the completed work, it was at the end of the old pier, the completed pier? A. Yes, sir.

Q. That is the old work that you are speaking about, and that is the light you are speaking about. I am speaking about the light that is displayed upon the work upon its being built, while it is in the course of construction, while the men are there doing the work of building? A. I can't say anything about that.

Q. You can't say what kind of a light should be there? A. No, sir.

Q. I am asking you with regard to the light that has been actually used upon that kind of a work. A. Yes, sir, there was a white light used.

Q. I ask you if you know of any instance where work was in the course of construction in any of these harbors or bays from Lake Superior, where any other than a white light was used? A. Government work do you mean?

Q. Government work. A. Yes, sir, Government work.

Q. Anywhere on this lake. A. Repeatedly I passed a red light when the Government was doing work, Government work.

Q. Where? A. At Soo River.

285 Q. I said in the Harbors and Bays of Lake Superior.

A. I don't know as I ever paid very much attention, because we always had lights to guide us by in the harbors. I never paid any particular attention to what lights were out there.

Q. You said, I believe, that the books and publications that you consulted and inquired of yourself as to the condition of the harbors were pamphlets issued by the Hydrographic Office? A. Yes, sir.

Q. They are called Notices to Mariners, I believe? A. Yes, sir.

Q. The object of this publication is to notify mariners from time to time of changes when they are going to make changes, and what changes are made; and it is very necessary, is it not,

Captain, for every master of a boat to consult those notices? A. Yes, sir. Going into a strange place I should think it would be.

Q. That is a part of his business isn't it? A. Yes, sir.

Q. There is also a map or chart issued by the Engineer's Office, isn't there? A. Of these different harbors?

Q. Yes, of these different harbors. A. Yes, sir, I presume there are some, but I never had any of them. I had late charts, that is all.

Q. You know that they are issued? A. Yes, sir.

Q. Late charts? A. Yes, sir.

Q. You know also that they are issued as aids to navigation, are they not? A. Yes, sir; that is what they are intended for.

Q. Yes, that is what they are intended for? A. Yes, sir.

Q. Now, you know also that the Engineer's Office
286 issues a bulletin or a pamphlet that is called a bulletin, that contains notices of the conditions existing at the harbors upon the lakes? A. I have never seen any.

Q. You have never seen any publication of that kind? A. No, sir, I don't think I have.

Q. I will ask you to look at Exhibit "D", and see if you have ever seen or have any knowledge of a publication of that character. A. I never have. I don't think I have ever seen one.

Q. You don't think you have ever seen one? A. No, sir, I don't think I have.

Q. I will show you plaintiff's Exhibit "A" being the chart or map of Agate Bay, and I will ask you if you have ever seen that map, or a chart of that character. A. That is the first I have ever seen, outside of a late chart. That is, this style of a chart.

Q. Did you know that such charts were printed and published by the Engineer's Office, and could be procured? A. Yes, sir.

Q. You knew that? A. Yes, sir.

Q. How long did you say you have sailed the lakes? A. I have sailed since 1860.

Q. You have never seen one of these bulletins issued by the Engineer's Office, or the Engineer's Department? A. I never had on in my possession that I can remember.

Q. And you have never seen one? A. No, sir, not until I saw this one.

Q. Then this bulletin is the first you ever saw? A. Yes, sir, that is the first I ever saw.

Q. I am speaking of bulletin Exhibit "D". A. No,
287 sir; I have never seen anything of that kind.

Q. You have never seen anything of that kind? A. No, sir.

Q. Did you know that such a document was published and circulated? A. No, I can't say that I did.

Q. You never knew of that? A. No, sir.

Q. What kind of a chart did you see; you said you had never seen a chart of this character, Exhibit "A", what kind of a chart was it that you saw? A. I have seen the latest charts of Lake Superior, these full length charts, all the lakes in one chart.

Q. You have never seen individual charts then of any particular harbor? A. No, sir, not of any particular harbor. I have had what we call civil engineer charts issued by such a man as Dickson, Civil Engineer, and some others, I have had those, but I never had any like these.

Q. You never knew that Exhibit "A" was published and could be procured at the Engineer's Office? A. I never needed one, I had sufficient charts to do me without that.

Q. Are you sure you have ever seen these Notices to Mariners? A. Yes, sir, I have got them.

Q. They are published very frequently? A. Yes, sir; but I would get them always too late, sometimes two or three weeks after. There was one issued some time ago and I got it last week.

Q. How long had this copy been issued? A. Some
288 time in May I think, and I got it in July.

Q. You got it in July? A. Yes, sir.

Q. It was not the fault of the Government that you got it so late was it? A. I don't know whose fault it was.

Q. You say that these publications are sent out very frequently? A. Yes, sir, we get them in bunches. We get an envelope full with ten or fifteen or twenty at a time.

Q. It is the business of the mariner to read them? A. Yes, sir, certainly it is, that is when we can get them.

Q. That is one of the sources of information that you get? A. Yes, sir; but they generally don't amount to much when the work is completed. It is quite likely that a man will get them when the work is completed.

Q. The masters of vessels then are not very diligent in searching round to get information? A. I don't know about the rest of them, but I think I am.

Q. You say you never knew about the publication of a chart of this character? A. No, sir, I never knew there was one in that shape.

Q. Nor did you know of the publication of this Exhibit "D"? A. No, sir.

Mr. Kremer: I want to offer in evidence from Exhibit 1, the section to which we have referred. I don't want to offer in evidence the whole book, but I will read from page

289 82 of the book called and entitled "List of Light and Fog Signals of the United States on the Northern Lakes and Rivers. Eleventh District, Minnesota and Michigan. Being No. 409 headed Two Harbors, Breakwater. On the outer end of the breakwater at the easterly side of the entrance to Two Harbors, Northwesterly shore of the westerly end of Lake Superior, Minn. Characteristic of light; Fixed Red. Order of Light; Lens Lantern. Height of Light above lake level in feet; 30 feet.

Counsel for defendant now moves the Court to direct a verdict for the defendant.

The Court denies the motion and counsel for defendant excepts to the ruling.

The case on the part of the defendant is now summed up to the jury by Mr. Kremer, and on the part of the Government, by Mr. Houpt.

290 The Court then charged the jury as follows:

Gentlemen of the jury,

This is an action arising out of an accident at the port of Two Harbors, Lake Superior, about 25 or 30 miles northeast of Duluth, on the 24th day of July, 1901. I think it is important that you should bear in mind that date in considering the evidence which has been offered here, and particularly the exhibits which have been introduced in evidence; that is, these bulletins, these charts and these various printed pamphlets. In order to properly consider that evidence, it will be well for you to bear in mind particularly the date of the happening of this accident.

Now, gentlemen of the jury, the accident arose out of a situation which existed at that harbor. On that day, the 24th, day of July, 1901, the steamship Shenandoah was in the harbor of Superior, just across the bay from where we sit; and about seven o'clock that evening the captain received orders to proceed to Two Harbors, and there get a tow which was being loaded at that port, and proceed down the lakes. In obedience to these orders the captain left the port of Superior. It seems that a considerable gale of wind had been blowing during the day, and continued to blow that evening.

291 He proceeded on his way, and arrived off the port of Two Harbors about 11 o'clock that evening. At that time the night was dark and cloudy, the wind still blowing, and there was a considerable sea running. He proceeded a little beyond the entrance to the harbor, and then came about, slowed down, and proceeded to enter the harbor. While getting into this harbor he ran upon an extension of the break-

water on the easterly side of the harbor, which was then in process of construction, breaking in this extension of the breakwater, and damaging it to the extent of $4012.50. There is no question about the amount of the damage; that is conceded all round.

Now, it appears that for some time prior thereto, in fact, for several years prior thereto, the government had been extending the breakwater there; I think for at last two years prior to the happening of this accident. For about two years, (you will remember the testimony) the government had been prosecuting the work of extending the old breakwater, which was on the easterly side of the entrance to that harbor, extending straight out from the easterly side of the harbor in a southwesterly direction, 750 feet, by a crib work breakwater filled with stone. This proposed extension was to run at an angle of about 45 degrees with the direction of the old breakwater, extending out into the lake 300 feet further. That was to be the length of this extension, in a southwesterly direction, and at an angle of 45 degrees from the old breakwater.

292 It seems that at the time of this accident this work had been so far prosecuted that the six cribs which were to constitute the extension of the breakwater had already been sunk. You will remember how these cribs were constructed: They were of timber 12 by 12, 18½ feet deep, 50 feet long, and 24 feet wide; so that six of them would make an extension of 300 feet at the end of this breakwater. At the time of this accident all six of these cribs had been placed in position, and had been sunk upon the rip-rap work which was the foundation. You will remember how, as the evidence shows, this work was constructed. First stone was dropped into the water, then an embankment made called rip-rap, which came up within 18 feet of the surface of the water, and was then levelled off; and these cribs when constructed were towed into place over this rip-rap embankment, filled with stone and sunk upon the embankment. These six cribs had at that time been sunk upon this rip-rap embankment, so that the outer edge, if I may use the expression, the outer edge of the tops of these cribs were about flush with the water; possibly a little below at the outer end, rising gradually until it joined the old breakwater. The inner edge or side of these cribs was something like a foot and a half or two feet above the surface of the water.

Now it appears here without any question, that a light had been placed by the engineering department of the government on the outer end of this extension, a white light attached to a mast or pole, about 14 feet from the surface of the water.

It appears that the captain approached this entrance
293 and took this light hung about 14 feet from the surface of the water to be the light of a ship lying at anchor, and attempted to pass between this light and the red light which had been placed and was upon the outer end of the 750 feet of the old breakwater. Of course, in doing this, in going between the two lights, he collided with the extension, and struck the extension at a distance of about 125 feet from the end of the old breakwater.

First, I will say there is no question but that this extension belonged to the government, and that for any injury to that extension, if any one is entitled to recover damages, the government is that person, the plaintiff in this action. So that the question arises between the government and the defendant, the Davidson Steamship Company, which was the owner of this steam ship.

This is an action for negligence. The plaintiff, the government, charges the defendant with negligence; and charges that by reason of that negligence this accident happened, the steamship ran into this breakwater, and therefore the government is entitled to recover such damages as accrued from that accident.

On the other hand, the defendant claims that the government's agents were negligent, and that but for that negligence the accident would not have happened. In other words, each party, the plaintiff and the defendant, is claiming that the other was negligent; so that the gist of this action is negligence.

294 Now, in an action of this kind, gentlemen of the jury, the test of negligence is ordinary care. Negligence is the failure of a person or party, in any situation in which he may be placed, to fulfill and perform those duties which the law imposes upon him. If he fails to perform those duties, and by that failure, or by reason of that failure, injury comes to any person, then that person is entitled to recover such damages as result directly from the injury.

Now, as to the parties here, the plaintiff the government, and the steamship company, the defendant, this case is to be tried between the government and the defendant, gentlemen of the jury, just as you would consider a case between any other parties. You must consider the government just as you would an individual, and this corporation just as you would an individual. They stand towards each other just the same as two individuals would stand. They must be judged by and held to the same standard that two individuals would be judged by and held to, if they were here in court.

As I stated before the test of negligence in cases of this sort is ordinary care. What do we mean by ordinary care? We mean such care as an ordinarily careful and prudent man would take or exercise, in view of all the circumstances in which he might happen to find himself.

Now let us see what the situation of the parties was here. These parties here, that is, the steamship company and the government, are obliged to act through agents. They
295 are obliged to act through officers; the government through the officers of its departments, and the steamship company through its master or captain.

Now what was the duty of that captain as he approached that harbor? The charge of the government is that he failed in his duty in two particulars: first, he failed to use ordinary care in informing himself as to the situation which then existed at that harbor, and particularly as to the then situation or condition of the extension of that breakwater; and second, he failed in his duty, in that he failed to exercise ordinary care in the manner in which he approached and attempted to enter that harbor.

Now, then, let us see what his duty was with regard to informing himself. First, I will say that the government in the exercise of its right, can improve any harbor on these lakes; and in the exercise of the rights that it has, it was at that time proceeding to do what it thought would be best to make that harbor safer and more convenient, for those who were required to go there. The government, it seems, used certain means for informing mariners on the lakes of the condition of the various improvements in the different harbors along these lakes, and of such things as a mariner should look out for. It seems from the evidence here, that the government publishes a book through the Lighthouse Board, publishes the book which is in evidence here showing the permanent lights and fog signals along the shores and in the various har-
296 bors and ports along the lakes. The Lighthouse Board was under the treasury department. It seems also that through the Hydrographic Office, the Navy Department publishes from time to time certain bulletins notifying all mariners, and all the world for that matter, notifying anybody of any changes that may occur in the various harbors, and of any obstructions or dangers to navigation that there may be.

It seems also, that the government through its army engineer department, which is under the War Department, publishes pamphlets giving information with regard to the progress of work which is going on, and of all obstructions which may arise therefrom in the various harbors.

All of these documents have been put in evidence here, and you can see what they are.

Now the government charges this captain with negligence, in that he failed to exercise ordinary care to use the means which were within his command, and which he knew of or ought to have known of, to inform himself as to the situation in that harbor. This is the first specification, if I may call it so, of negligence against the captain: that he failed to use ordinary care in informing himself as to the condition in that harbor.

Now, gentlemen of the jury, you have heard the evidence as to where the publications are made, as to how they were published, as to how they were mailed, and as to where they can be obtained; and it is for you to say from this evidence whether or not this captain did fail to exercise ordinary care in
297 obtaining the information which he might have obtained with reference to the conditions existing at that port, and at that extension of the breakwater.

If you find from the evidence, gentlemen of the jury, that he did exercise such ordinary care to inform himself, then he was guilty of no negligence in that respect; and then you will pass on to the question as to whether or not he exercised ordinary care in the manner in which he approached or attempted to enter that harbor. You have heard the evidence here with respect to his mistaking the light at the outer end of the extension for the light of a ship at anchor. The law is that any ship lying at anchor in a harbor, or anywhere for that matter, must display a white light on some part of the vessel, not more than 20 feet from the water. Here is a light 14 feet from the water. You have heard the evidence from this captain that he supposed that light was the light of a ship at anchor, and that he thought he had a wide enough berth between that and the light at the end of the breakwater to pass between them; and that he thus ran into this extension.

It is for you to say, gentlemen of the jury, and the matter for your determination is, whether this captain was guilty of any negligence with regard to informing himself, and using the means which were at his command, or which he ought to have had, in the exercise of ordinary care; whether he exercised ordinary care to inform himself, and to use the means of information which were at his command.

298 If you find from the evidence that he did use such care, then you will pass to this next proposition; whether on

entering that harbor he also used ordinary care in the manner in which he attempted to enter that harbor. If you find that also in favor of this captain, or this defendant, then that ends the case, and you are then obliged to find for the defendant; because if the captain was not guilty of any negligence in one or the other of these two particulars, if he was not guilty of any negligence at all, then this defendant was guilty of no negligence, there can be no recovery, and your verdict must be for the defendant.

If, on the other hand, you find that in either of these particulars this captain was negligent, then you will proceed to consider the conduct of the plaintiff the government. You will proceed to consider whether the plaintiff, the government also exercised ordinary care, not only in the manner in which it furnished information to mariners, but also in the means that it took then and there on that work, to put up proper warnings and signals and lights, to advise persons sailing in and out of that harbor of the dangers existing there.

You have heard the evidence as to how this information was given out. First, as to this book of fog signals and lighthouses, and then these various bulletins issued by the Hydrographic Office, how they were mailed, where they could be obtained, and what notice was given to the public as to how they could
299 be obtained. Also as to these pamphlets, and similar pamphlets, issued by the engineering department of the government.

Now, gentlemen of the jury, if the government failed to exercise ordinary care, just like that which an individual would be held to; if the government failed to exercise ordinary care in giving that information, (because the government in prosecuting work in and about these harbors is obliged to give due and timely notice of any danger or obstruction that there may be to navigation), I say, if you find from the evidence that the government of the United States failed to exercise ordinary care in giving such notice; or, if it failed to exercise ordinary care in placing proper warnings, lights or signals, to advise people who might be in that locality where the obstruction or danger was; if you find a failure on the part of the government in either of these respects, which contributed to the happening of this accident, then you are obliged to find for the defendant.

In an action of this kind the plaintiff is not only obliged to show negligence on the part of the defendant, but it must also appear from the evidence that the plaintiff itself has not been negligent; that is, if it appears from the evidence that the negligence of the plaintiff has contributed, in whole or in part, to the producing of the accident, it cannot recover.

Now then, let us sum it all up, and what is the situation? The first thing you will do is to determine whether or not this captain was negligent in either or both of the particulars which I have mentioned. If he was not guilty of such negli-
300 gence, then that is an end of the case, and you will find for the defendant. If you find he was so negligent in either or both of those particulars, then you will pass to the consideration of the conduct of the plaintiff here. Was the plaintiff negligent in either of the particulars to which I have referred, and did that negligence contribute, in whole or in part, to the happening of this accident? If you find, gentlemen, that the plaintiff was so negligent, then that is an end of the case, and you will find for the defendant.

If you find, however, that the defendant was negligent, and that the plaintiff was not negligent, as I have indicated to you, then you are obliged to find for the plaintiff. If you find for the plaintiff you must find for the sum of $4012.50; and you can, but you are not obliged to do so, still if you think it ought to be done, you can allow interest on that amount from the first day of October, 1901. It seems the work was completed some time in the month of September.

Now upon the question of the defendant's negligence, the burden of proof is upon the plaintiff, the government. That is, the government must establish that fact by a fair preponderance of the testimony. If, in considering the negligence of the defendant, the evidence in your minds is evenly balanced, then you will find for the defendant; the fair weight of the testimony must be on the side of the government in establishing the negligence of the defendant.

The same rule applies to the negligence of the plaintiff. If you get so far as to pass to the consideration of the
301 negligence of the plaintiff, then the burden shifts, and the burden is then upon the defendant, by a fair preponderance of the evidence, to show that the government was guilty of negligence, and that such negligence contributed, in whole or in part, to the happening of this accident. I do not think I need explain this case any further.

Mr. Kremer: I would suggest that the Court instruct the jury as to the duty of the government in giving notice.

The Court. I have already explained that it is the duty of the government when it is making these improvements in the harbors, it is its duty, and the law requires, and any one can easily understand without any law that it would be the duty of the government, when men are sailing in and out of these harbors, to give due and timely warning and notice of

any danger or obstruction anywhere to navigation, and also to display proper warning signals or lights, to warn mariners of the particular place where the d-nger may lie.

Mr. Houpt. I would ask the court to instruct the jury as to the duty of the mariner.

The Court. It was the duty of this mariner to inform himself; what I mean is, to use ordinary care, just as it was the duty of the government to use ordinary care, in the cases I have referred to, to use ordinary care, such care as an ordinarily prudent and careful man would use under all the circumstances, to inform himself as to the situation, and
302 to use all the sources of information which are available, which he knows are available or which he ought to know are available for that purpose.

Gentlemen of the Jury, This plaintiff is entitled to recover the amount of $4,012.50, or it is not entitled to recover anything. If you agree upon a verdict for the [palintiff] bring it in for that amount; but if you are not going to bring it [im] for that amount, you will bring in a verdict for the defendant.

303 Defendant's Requests.

1st.

The Court instructs you as a matter of law, that when the Government of the United States comes into its own Courts, it is treated exactly as any private individual is, it is subject to the same rules of law that apply to causes where only private individuals are parties. If in the case at bar you shall find that the Government was guilty of any neglect, or negligence that contributed to the collision with the breakwater, your verdict should be for the defendant, for the rule of law is, that where there is any contributory negligence, no recovery can be had.

Which said request was not given by the Court, save as the same may be given in the general charge.

2nd.

The Court instructs you as a matter of law, that while the use of a white light to mark the extension of a breakwater, is not prohibited by law, yet it was the duty of those in charge of the breakwater extensions in question to use such a light or lights, as would not be misleading to mariners. The Government lighthouse book issued to mariners for use that season,

states that the outer end of the breakwater at Two Harbors, was marked by a red light. The Court instructs you
304 that if a change of lights was made by the Government, and some other than a red light was used to mark the actual outer end of said breakwater such change should have been given by the Government, through the usual channels, and if you shall find that no such notice was given by the Government, and such failure contributed to the collision, your verdict should be for the defendant.

Which said request was refused by the Court.

3rd.

The pilot and officers of a steam vessel are not required to exercise the highest degree of care and skill or even extraordinary care and skill. All that is demanded of them is that they use ordinary skill and care, and the jury must determine whether under the circumstances of the case they came up to this requirement.

Which said request was not given by the Court, save as the same may be given in the general charge.

4th.

If you shall find from the evidence that no notice was ever given by the Government, of the use of a white light to mark the actual outer end of the breakwater at that place. The officers of the Shenandoah, on approaching the port of Two Harbors, at night as they did, had a right to rely upon the Government instructions as indicated in its published light house book, namely that a red light marked the outer end of the breakwater.

305 Which said request was refused by the Court.

5th.

The Court instructs you that the law relating to the navigation of the Great Lakes requires a vessel at anchor to display a white light, where it can be seen, at a height not to exceed twenty feet above the vessel's hull, and it is for you to determine from the evidence, whether in that situation, the master of the Shenandoah was guilty of any neglect in mistaking the white light in question for a vessel at anchor.

Which said request was not given by the Court, save as the same may be given in the general charge.

6th.

The Court instructs you that if the plaintiff maintained upon the end of the extension of the Government pier, at the time in question, a white light, which was not known to the officers of the Shenandoah, as marking such extension, and they, in the exercise of reasonable care could not see or know it as marking such extension, and they were misled by the color of said light, into the belief that it was the light of a vessel at anchor in the harbor, then your verdict should be for the defendant.

Which said request was refused by the Court.

306 7th.

The Court instructs you that in an action for negligence the presumpton is that due care was exercised, and the burden of proof is upon the plaintiff to show by a preponderance of creditable evidence, that the defendant has been guilty of some negligence.

Which said request was not given by the Court, save as the [saem] may be given in the general charge.

307 Defendant's Exceptions.

Counsel for defendant excepts to the refusal of the Court to give the second request herein asked by defendant.

Counsel for defendant excepts to the refusal of the Court to give the fourth request herein asked by defendant.

Counsel for defendant excepts to the refusal of the Court to give the sixth request herein asked by defendant.

Counsel for defendant excepts to the definition of negligence, as given by the Court in the general charge.

308 PLAINTIFF'S EXHIBIT "A".

This consists of a certain chart of Agate and Burlington Bays, Minnesota, North shore of Lake Superior. Issued by the United States Government, March 6, 1901.

(See page 322 for map.)

309 PLAINTIFF'S EXHIBIT "B".

This consists of an octavo pamphlet, entitled "Notice to Mariners, published weekly by the Hydrographic office", No. 30, Washington, D. C. July 29, 1899.

The portion of said Exhibit particularly referred to, and offered in evidence, is as follows:

"(703) Lake Superior—Minnesota—Two Harbors—Information concerning breakwater—Depth alongside docks—The following information concerning the Government breakwaters at Two Harbors was obtained from Mr. J. H. Darling, U. S. Assistant Engineer:

The breakwater at the west side of the harbor is built to the length of 750 feet, 150 feet to be added and finished in the year 1900.

The breakwater at the east side of the harbor is built to the length of 750 feet; the proposed extension of 250 feet in the same direction has been abandoned and in its stead an extension at an angle of 45 degrees southward 300 feet in length is proposed, making the entire length of this (eastern) breakwater, 1,050 feet. This is also to be finished in the year 1900.

Information has been received from Mr. R. Angst, Chief Engineer of the Duluth and Iron Range Railway, that the
310 least water on both sides of all the ore docks in Agate Bay, Two Harbors is 20 feet, 18 feet on both sides of the merchandise dock, and the same depth on the southwest side of the coal dock."

311 PLAINTIFF'S EXHIBIT "C".

This consists of an octavo pamphlet, entitled: Notice to Mariners, published weekly by the Hydrographic Office, No. 32, Washington, D. C. August 11, 1900.

The portion of said exhibit particularly referred to, and offered in evidence, is as follows:

"(859)—Lake Superior—Minnesota—Two Harbors breakwater—Caution. Referring to Notice to Mariners No. 30, (703) of 1899, further information has been received that the work on the extension of the breakwater piers at Two Harbors has been actively carried on by the Government since the opening of navigation.

A communication from the contractor, dated July 31st, 1900, states that the submarine work on the extension of the east breakwater has now advanced so far as to leave only 16 feet of water over the embankment. Such a spot is located about 200 feet from the end of the old breakwater.

Masters of vessels are therefore cautioned on entering the harbor, to give the old breakwater a berth of 300 feet, and not to round the east breakwater close on board, as formerly, on account of this danger."

312 PLAINTIFF'S EXHIBIT "D".

This consists of a quarto pamphlet, entitled as follows:

"Corps of Engineers, U. S. Army.
Surveys.
Northern and Northwestern Lakes.
Bulletin No. 10.

To Supplement the information given upon the charts of the Great Lakes, and will be issued with these charts from the office of U. S. Lake Survey, Detroit, Michigan.

(All previous bulletins should be destroyed.)

Note: This bulletin may also be obtained upon application from the following U. S. Engineer Offices, Duluth, Minn." etc.

JOHN M. WILSON,
Brig. Gen. Chief of Eng. U. S. A.

Etc."

313 PLAINTIFF'S EXHIBIT "E".

This consists of a certain blue print described as follows:

Agate Bay, Minn.
Extension of East Breakwater,
Rip Rap Embankment.
Map and General Plan.

Soundings are in feet and reduced to low water datum." Etc."

(See page 323 for Blue Print.)

314 DEFENDANT'S EXHIBIT "I".

This consists of a book entitled: "List of Lights and Fog Signals of the United States on the Northern Lakes and Rivers, and also of the Lights and Fog Signals of the Dominion of Canada on Those Waters. Corrected to the Opening of Navigation, 1901. Washington: Government Printing Office, 1901."

The portion of said book referred to in the testimony is as follows:

Number 409. Two Harbors breakwater. On the outer end of the breakwater at the easterly side of the entrance to Two Harbors, Northwesterly shore of the westerly end of Lake Superior, Minn. Characteristic of Light; Fixed Red. Order of Light; Lens Lantern.

Height of Light above lake level in feet; 30 feet.

315 United States Circuit Court, District of Minnesota, Fifth Division.

The United States of America, Plaintiff,
against
Davidson Steamship Company, Defendant.

Verdict.

We the Jury in the above entitled cause find for the plaintiff and assess its damages at the sum of Four Thousand Twelve and 50/100 Dollars.
$4012.50.
Dated this 14th day of July, 1904.

JOHN SCHMIT,
Foreman.

Filed May 15th, 1904. Henry D. Lang, Clerk.

316 United States of America,
District of Minnesota.

I hereby certify that the foregoing is a true, full and correct transcript of all the evidence taken and proceedings had in the case of United States of America v. Davidson Steamship Company, together with all the rulings, objections and exceptions had on the said trial, and that the Exhibits herein, insofar as the same appear correctly show such portions of the documents offered in evidence as refer to this case.

Witness my hand this first day of September, A. D. 1904.

H. HARCOURT HORN,
Reporter U. S. Courts, Minnesota.

317 The United States Circuit Court. District of Minnesota, Fifth Division.

The United States of America, Plaintiff,
vs.
The Davidson Steam Ship Company Defendant.

Motion for New Trial.

Now comes the defendant the Davidson Steamship Company and moves the Court for Judgment in its favor, notwithstanding the verdict, that if the same be denied, that the Court set aside the verdict herein and grant a new trial on the following grounds.

1st. For errors in law occurring at the trial and excepted to by the defendant.

2d. For errors at the verdict is not justified by the evidence and is contrary to law.

C. E. KREMER,
H. R. SPENCER,
Attorneys for defendant.

August 8th 1904.

On motion of counsel for defendant, it is hereby ordered that a stay be entered in said cause until the first day of October 1904 and for such further time as the Court may direct, and that the defendant have [untill] said date to prepare its motion for a new trial and its bill of exceptions herein.

Duluth Minn., August 8th 1904.

PAGE MORRIS, Judge.

318 The United States Circuit Court. District of Minnesota. Fifth Division.

The United States of America, Plaintiff,

vs.

The Davidson Steam Ship Company Defendant.

Notice of Motion for New Trial.

To Charles C. Houpt Esq, United States Attorney, District of Minnesota.

Please take notice that the defendant herein has filed a motion for Judgment notwithstanding the verdict, and that if the same be denied That the verdict be set aside and a new trial granted on the following grounds towit.

1st. For errors in law occurring at the trial and excepted to by the defendant.

2d. That the verdict is not justified by the evidence and is contrary to law.

That said motion will be [heared] upon the minutes of the stenographer who reported said cause, and upon the Minutes of the Honorable Page Morris the Judge who tried said cause, as well as upon the records and files therein. That said motion will be brought on for hearing at the City of Duluth on Saturday the 1st day of October 1904 at ten o'clock AM or as soon as counsel can be [heared] thereafter, at the Chambers of the Court.

C. E. KREMER,
H. R. SPENCER,
Attorne-s for Defendant.

August 8th 1904.

319 The United States Circuit Court. District of Minnesota, Fifth Division.

The United States of America, Plaintiff,
vs.
The Davidson Steam Ship Company, Defendant.

Order Over-ruling Motion for Judgment and New Trial.

Defendant's motion for judgment and a new trial in the above entitled cause came on for hearing on this date the parties being represented by their respective attorneys. After argument had it is hereby ordered that said motion be and the same is denied, to which ruling the defendant duly excepts.

Duluth Minn Oct 1st 1904.
PAGE MORRIS, Judge.

320 The United States Circuit Court. District of Minnesota Fifth Division.

The United States of America, Plaintiff,
vs.
The Davidson Steam Ship Company Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above and foregoing proposed bill of exceptions, that the same may be settled and allowed by the Court as a true and correct bill of exceptions and case herein, containing all the evidence given, received and offered, upon the trial of said cause, and all proceedings had therein, together with the rulings of the Court and all the exceptions taken by the defendant, The Davidson Steam Ship Company, Upon the trial of said action.

Duluth Minn Oct 1st 1904.

CHAS. C. HOUPT,
Attorney for Plaintiff.
H. R. SPENCER,
C. E. KREMER,
Attorneys for Defendant.

321 The United States Circuit Court, District of Minnesota Fifth Division.

The United States of America, Plaintiff,
vs.
The Davidson Steam Ship Company.

Order Settling Bill of Exceptions.

The matter of the proposed bill of exceptions of the defendant in the above entitled action having come on for hearing and settlement on this date, the first day of October, 1904, by and before the Honorable Page Morris, Judge of the United States Circuit Court aforesaid, before whom the above entitled cause was tried, the parties being represented by their respective counsel, and the court being duly advised in the premises, and the foregoing bill of exceptions having been by the Court duly examined and found conformable to the truth. It is therefore ordered that the same be and it is hereby approved settled and allowed and signed as and for a bill of exceptions, herein and as a true and correct statement of the case in the above entitled action upon [upon] the trial thereof, and all and every of the proceedings had therein, together with all the rulings of the Court and all the exceptions taken by the defendant, the Davidson Steamship Company, upon the trial of said action and the same is in all respects duly approved.

PAGE MORRIS, Judge.

Duluth, Minn., October 1st, 1904.

322 Indorsed: Plaintiff's Exhibit "A". Filed May 19. 1902. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

FOLD OUT IS TOO LARGE TO BE FILMED

323 Indorsed: Plaintiff's Exhibit "E" Filed May 19, 1902. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

FOLD OUT IS TOO LARGE TO BE FILMED

324 That further on the same day, to-wit: On the 1st day of October, A. D. 1904, there was filed with said Clerk in said cause, the following papers, viz: Notice of Appeal, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Writ of Error, Bond on Appeal, Prayer for Reversal and Citation; which said documents are, in words and figures, as follows, to-wit:

The United States Circuit Court, District of Minnesota, Fifth Division.

The United States of America, Plaintiff,
vs.
The Davidson Steam Ship Company, Defendant.

Notice of Appeal.

To Charles C. Houpt, Attorney for the United States, District of Minnesota, Fifth Division:

You will take notice that the defendant in the above entitled cause, has this day taken out a writ of error, wherein it has applied to the United States Circuit Court of Appeals for the Eighth Circuit, to correct the errors appearing in the record of said cause, and to render speedy justice to said defendant as prayed for in its petition for a writ of error, copies of which are herewith served upon you.

C. E. KREMER,
H. R. SPENCER,
Attorneys for Defendant.

Dated Duluth, Minn., October 1st, 1904.

325 Indorsed: Notice of Appeal. Due service of the within notice admitted Oct. 1, 1904. Chas. C. Houpt, Atty. for Plaintiff. Filed Oct. 1st, 1904. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

The United States Circuit Court District of Minnesota, Fifth Division.

The United States of America, Plaintiff,
vs.
The Davidson Steam Ship Company, Defendant.

Petition for Writ of Error.

The Davidson Steam Ship Company, defendant in the above entitled cause feeling itself aggrieved by the verdict of the jury and the judgment entered on the 15th day of July 1904, comes now by C. E. Kremer, and H. R. Spencer, its attorneys and petitions said Court for an order allowing said defendant to prose-

cute a writ of error to the Honorable the United States Circuit Court of Appeals for the Eighth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Eighth Circuit, and your petitioner will ever pray.

THE DAVIDSON STEAM SHIP COMPANY,
By C. E. Kremer and H. R. Spencer,
Attorneys for Petitioner.

Dated October 1st, 1904.

326 Indorsed: Petition for Writ of Error. Due service of the within petition admitted Oct. 1, 1904. Charles C. Houpt, Atty. for Plaintiff. Filed Oct. 1st, 1904. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

The United States Circuit Court District of Minnesota, Fifth Division.

The United States of America, Plaintiff,
vs.
The Davidson Steam Ship Company, Defendant.

Assignment of Error.

Now comes the defendant the Davidson Steam Ship Company and files the following assignment of errors upon which it will rely in the prosecution of the writ of error in the above entitled cause.

1st. That the United States Circuit Court for the District of Minnesota Fifth Division, erred in permitting the plaintiff to cross-examine Captain John McAvoy in its evidence in chief against the objection of defendant.

2d. That the Court erred in admitting the witness Powell to testify as to what is the usual light used for improvements under construction such as the break water at Two Harbors, at the time in question, against defendants objections, to which ruling the defendant excepted.

3d. That the Court erred in overruling defendants objection to the following question asked by plaintiffs counsel to the witness Wetton,

327 Q. Do you know what the character of the light was that is used as a warning or danger signal upon these works you have been engaged in. What is the nature of the light," To which ruling of the court the defendant excepted

4th. That the Court erred in overruling defendants objection to the following question asked the witness Krey in direct examination, and objected to by defendant.

Q. Did you ever see in the whole course of your work any other light than a white light upon the Government work in progress of construction upon the Great Lakes. To which ruling of the Court the defendant excepted.

5th. That the Court erred in overruling defendants objection to the following question asked the witness Krey, in direct examination by plaintiff,

Q. During that time do you know what kind of lights the Government officers or contractors I mean Government officers put out as signals for [marriners] upon these works, that are in process of construction.' To which ruling of the Court defendant excepted.

6th. That the Court erred in admitting in evidence Plaintiffs Exhibit A and B, against the objection of defendant to which ruling of the Court the defendant excepted.

7th. That the Court erred in admitting in evidence Plaintiffs Exhibit C against the objection of defendant, to which objection the defendant excepted.

8th. That the Court erred in overruling defendants objection to the following question asked the witness Henrich.

328 Q. The light house board does not give warning with regard to lights or take any notice of lights that are upon constructions or improvements that are in the hands of the engineers?" To which ruling of the Court the defendant excepted.

9th. That the court erred in overruling defendants objection to the introduction in evidence of Plaintiffs exhibit D, to which ruling of the Court the defendant excepted.

10th. That the Court erred in overruling defendants objection to the following question asked the witness Gaillard in direct examination, by plaintiff.

Q. Captain state what kind of a light was displayed upon the new work that you have described as having been performed during the time you were located here at Duluth, to which ruling of the Court the defendant excepted.

11th. That the Court erred in overruling defendants objection to the following question asked the witness Gaillard, in direct examination, Q. Do you know whether or not it is cus-

tomary for masters of vessels to procure these maps as aids to navigation?, to which ruling of the Court the defendant excepted.

12th. That the Court erred in overruling defendants objection to the following question asked in [direction] examination of the witness Howard, by Plaintiff, Q. What is the custom of Masters of vessels as to receiving notices of that nature, (referring to exhibits B, and C,) to which ruling of the Court defendant excepted.

13th. That the Court erred in overruling defendants objection to the following question asked the witness Howard, by plaintiff in direct examination, Q. State whether or not
329 it is customary for mariners of vessels to obtain these notices to mariners issued by the Hydrographic office?" to which ruling of the Court the defendant excepted.

14th. That the Court erred in overruling defendants objection to the following question asked the witness Howard, by plaintiff in direct examination, Q. In your experience and observation as a sailor do you know the kind of light that is displayed in harbors upon breakwaters and piers in this district?, during the process of construction by the Government?, To which ruling of the Court the defendant excepted.

15th. That the Court erred in overruling defendants motion to dismiss the case at the conclusion of plaintiffs evidence, to which ruling the defendant excepted.

16. That the Court erred in excluding as evidence, a notice to mariners dated at Washington October 19th, 1901, offered by defendant, which notice describes the light used on the extension of the pier work, in question, To which ruling the defendant excepted.

17th. That the Court erred in refusing to allow defendant to ask the following question of the witness Henrich.

Q. Suppose that as a mariner you were bound for the port of Two Harbors on a dark night, and should see a white light several hundred feet off from the regular beacon light which is a red light, there at Two Harbors, what would a mariner ordinarily take such a light to be there, or to represent without knowledge of the extension of an obstruction which might be lighted up that way?, To which ruling the defendant excepted.

18th. That the Court erred in sustaining plaintiffs
330 objection to the following question asked the witness Henrich by defendant.

Q. If the light house board had prescribed a red light to mark the end of the break water at Agate Bay what do you say as to the propriety of using a white light to mark the extension of that breakwater to which ruling the defendant excepted.

19th. That the Court erred in refusing to permit defendant to show by the witness Krey that another vessel had collided with that break water at Two Harbors, by reason of the moving of the red light marking the outer end of the break water, prior to the collision in question. To which ruling defendant excepted.

20th. That the Court erred in refusing to receive in evidence a letter written by the witness Krey who was in charge of the construction of said breakwater, to the Plaintiffs officer in Duluth having charge of said works at Two Harbors, prior to the collision in question, calling his attention to the moving of the red light, back from the outer end of the break water, and that a white light was used to mark the submerged portion of the break water extension, To which ruling of the Court the defendant excepted.

21st. That the Court erred in sustaining plaintiffs objection to the following question asked the witness Girard by defendant.

Q. What to a mariner is a bay like Agate Bay would a single stationary red light indicate, I mean outside of a regular light house?, to which ruling the defendant excepted.

22d. That the Court erred in denying defendants motion to direct a verdict for the defendant at a conclusion of the evidence, for the reason that no negligence was shown on the part of the officers or crew of defendants vessel, and for the further reason that the evidence shows that the Plain-
331 tiff was guilty of such contributory negligence as to bar a recovery. To which ruling the defendant excepted.

23rd. That the court erred in charging the Jury as follows. "Negligence is the failure of a person or party in any situation in which he may be placed to fulfill and perform those duties which the law imposes upon him. If he fails to perform those duties and by that failure or by reason of that failure injury comes to any person then that person is entitled to recover such damages as result directly from the injury.

24th. That the Court erred in refusing to give the following instructions to the jury as requested by defendant.

2nd. The Court instructs you as a matter of law that while the use of a white light to mark the extension of a breakwater is not prohibited by law, yet it was the duty of those in charge

of the breakwater extensions in question, to use such a light or lights as would not be misleading to mariners. The Government light house book issued to mariners for use that season states that the outer end of the breakwater at Two Harbors was marked by a red light. The Court instructs you that if a change of lights was made by the Government and some other than a red light was used to mark the actual outer end of said break water, notice of such change should have been given by the Government through the usual channels, and if you shall find that no such notice was given by the Government, and such failure contributed to the collision your verdict should be for the defendant."

4th. If you shall find from the evidence that no notice was ever given by the Government of the use of a white
332 light to mark the actual outer end of the breakwater at that place, the officers of the Shenandoah on approaching the port of Two Harbors at night as they did, had a right to rely upon the Government instructions as indicated in its published light house book, namely that a red light marked the outer end of the breakwater.

6th. The Court instructs you that if plaintiff maintained upon the end of the extension of the Government pier, at the time in question, a white light which was not known to the officers of the Shenandoah, as marking such extension, and they in exercise of reasonable care could not see or know it as marking such extension, and they were mislead by the color of said light into the belief that it was the light of a vessel at anchor in the harbor then your verdict should be for the defendant." To which defendant excepted.

25th. That the Court erred in not granting defendants motion for judgment notwithstanding the verdict, or to grant a new trial in the case, to which ruling of the Court the defendant excepted.

26th. That the Court erred in sustaining Plaintiffs objection to the introduction in evidence of Defendants Exhibit 2, to which ruling defendant excepted.

Wherefore the said defendant the Davidson Steamship Company, plaintiff in error prays that the judgment of the Circuit Court of the United States for the District of Minnesota, Fifth Division be reversed and that said Circuit Court be directed to grant a new trial of said cause.

October 1st 1904.

C. E. KREMER,
H. R. SPENCER,
Attorneys for Plaintiff in error.
Defendant in the lower Court.

333 Indorsed: Assignment of Error. Due service of the within admitted Oct. 1, 1904. Chas. C. Houpt. Atty. for Plaintiff. Filed Oct. 1st, 1904. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

The United States Circuit Court District of Minnesota Fifth Division.

The United States of America, Plaintiff.

vs.

The Davidson Steamship Company Defendant.

Order Allowing Writ of Error.

At a stated term, towit, the July term, A. D. 1904, of the Circuit Court of the United States in and for the District of Minnesota, Fifth Division, Present the Honorable Page Morris, Judge, upon the motion of C. E. Kremer and H. R. Spencer, attorneys for defendant in the above entitled cause, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed, to have reviewed in the United States Circuit Court of Appeals, for the Eighth Circuit, the Judgment heretofore entered herein, and that the amount of bond on said writ of error be and is hereby fixed at $5900.00. Upon the filing of a bond in that amount to be approved by the Clerk of said Court, a stay of execution is hereby ordered until otherwise ordered, said bond to act as a supersedeas bond as well as a bond for costs.

PAGE MORRIS, Judge.

Dated October 1st, 1904.

Indorsed: Order Allowing Writ of Error. Service of the within Writ of Error admitted Oct. 1, 1904. Charles C. Houpt, Atty. for Plaintiff. Filed Oct. 1st, 1904. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

334 The United States Circuit Court. District of Minnesota Fifth Division.

The United States of America, Plaintiff.

vs.

The Davidson Steamship Company Defendant.

Writ of Error.

The United States of America—ss.

The President of the United States of America, To the Honorable Judge of the Circuit Court of the United States for the District of Minnesota Fifth Division—Greeting:

Because of the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit

Court before you in the July term 1904, of said court thereof, between the United States of America, Plaintiff, and the Davidson, Steamship Company, defendant, wherein a manifest error hath happened, to the great damage of the said Davidson Steam Ship Company, as by its assignment of errors and complaint appears, We being willing that error, if any hath been should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the twenty ninth day of November 1904, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1st day of October 1904. Issued at office in the City of Duluth, Minnesota, with the seal of the Circuit Court of the United States for the District of Minnesota, Fifth Division, and dated as aforesaid.

U. S.
Circuit Court
Seal.
Dist. of Minnesota.
Fifth Division.

HENRY D. LANG,
Clerk of the United States Circuit Court, District of Minnesota.
By Thos. H. Pressnell,
Deputy Clerk.

335 Allowed this 1st day of October A. D. 1904.
PAGE MORRIS, Judge.

United States of America,
District of Minnesota,
Fifth Division—ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the Circuit Court of the United States for the District of Minnesota, Fifth Division.

U. S. Circuit Court Seal. Dist. of Minnesota. Fifth Division.

HENRY D. LANG,
Clerk of the Circuit Court of the United States of America for District of Minnesota.
By Thos. H. Pressnell, Deputy.

336 Entered No. 19 U. S. The U. S. Circuit Court. Dist of Minn. 5th Div. The United States of America, vs. The Davidson Steam Ship Company. Writ of Error. Due service of the within writ admitted Oct. 1, 1904. Chas. C. Houpt, Atty. for Plaintiff. C. E. Kremer and H. R. Spencer, Attorneys for Defendant. Filed Oct. 1st, 1904. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

337 The United States Circuit Court District of Minnesota, Fifth Division.

The United States of America, Plaintiff,
vs.
The Davidson Steam Ship Company, Defendant.

Know all men by these presents that The Bankers Surety Company of Cleveland, Ohio, are held and firmly bound unto the United States of America, in the full and just sum of Five Thousand dollars to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves our successors and assigns, jointly and severally by these presents. Sealed with our seal and dated this 1st day of October 1904.

Whereas lately at the July 1904 term of the Circuit Court of the United States for the District of Minnesota, Fifth Division, in a suit pending in said Court between the United States of America, Plaintiff, and The Davidson Steamship Company, Defendant, a judgment was rendered against the said Davidson Steam Ship Company, and the said Davidson Steam Ship Company has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation, Now the condition of the above obligation, is such that if the said Davidson Steam Ship Company shall prosecute said writ of error to effect and

answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

THE BANKERS SURETY COMPANY OF
Sealed and delivered CLEVELAND, OHIO, [Seal]
in presence of By Lane MacGregor, Agent.
James W. Wood, By H. R. Spencer, Attorney.
F. N. Hinkley. [Corporate Seal]

338 State of Minnesota,
County of St. Louis—ss.

On this 3rd day of October A. D. 1904, before me, appeared Lane MacGregor and H. R. Spencer to me personally known, who being by me duly sworn, did say, that they are respectively the Agent and the Attorney of The Banker's Surety Company, of Cleveland, Ohio, a Corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said Corporation by authority of its Board of Directors, and said Lane MacGregor and H. R. Spencer acknowledged said instrument to be the free act and deed of said Corporation.

[Notarial Seal] M. J. MULLIN,
Notary Public, St. Louis County, Minnesota.

Indorsed: Appeal Bond. The within bond is hereby approved. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk. October 3d 1904. Filed Oct. 3, 1904. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

The United States Circuit Court District of Minnesota, Fifth Division.

The United States of America, Plaintiff,
vs.
The Davidson Steamship Company, Defendant.

Prayer for Reversal.

To the United States Circuit Court of Appeals for the Eighth Circuit:

The defendant the Davidson Steam Ship Company, plaintiff in error, who has sued out a writ of error to said Circuit Court for the District of Minnesota, Fifth Division, made and entered in the above entitled action on the 1st day of October, 1904, as mentioned in the writ of error, [prayes] that the errors in said

judgment in all respects may be corrected and that this Court may make such other and further order or decrees in the premises as may be just and equitable.

THE DAVIDSON STEAM SHIP COMPANY,
By C. E. Kremer, H. R. Spencer,
Attorneys for Defendant.

Dated October 1st, 1904.

Indorsed: Prayer for Reversal. Due service of the within Prayer for Reversal admitted Oct. 1, 1904. Chas. C. Houpt, Atty. for plaintiff. Filed Oct. 1st, 1904. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

339 The United States Circuit Court, District of Minnesota, Fifth Division.

The United States of America Plaintiff,
vs.
The Davidson Steam Ship Company, Defendant.

Citation.

The United States of America to The United States of America —Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerks office of the United States Circuit Court for the District of Minnesota, Fifth Division, wherein the Davidson Steam Ship Company is Plaintiff in Error and you are Defendant in Error, to show cause if any there be why the Judgment rendered against the said Davidson Steam Ship Company, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Page Morris Judge of the United States Circuit Court District of Minnesota, Fifth Division, this 1st day of October, A. D. 1904.

PAGE MORRIS,
Judge of the United States Circuit Court,
Fifth Division, District of Minnesota.

340 Entered No. 19 U. S. U. S. Circuit Court, Dist. of Minn. 5th Div. The United States of America vs. The Davidson Steam Ship Company. Citation. Due service of the within Citation admitted Oct. 1, 1904. Chas. C. Houpt, Atty for Plaintiff. C. E. Kremer & H. R. Spencer, Attorneys for Defendant. Filed Oct. 1st, 1904. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

341 United States of America.

Circuit Court of the United States, District of Minnesota, Fifth Division.

I, Henry D. Lang, Clerk of said Circuit Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing, consisting of 340 pages, numbered consecutively from 1 to 340 inclusive, is a true and complete transcript of the Records, Process, Pleadings, Orders, Judgment and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

U. S. Circuit Court Seal Dist. of Minnesota. Fifth Division

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at Duluth, in the District of Minnesota, this 26th day of October A. D. 1904.

HENRY D. LANG, Clerk.
By Thos. H. Pressnell,
Deputy Clerk.

Filed Nov. 28 1904. John D. Jordan, Clerk.

(*Appearance of Mr. H. R. Spencer and Mr. C. E. Kremer for Plaintiff in Error.*)

On the twenty-eighth day of November, A. D. 1904, the appearance of Mr. H. R. Spencer and Mr. C. E. Kremer as counsel for the plaintiff in error was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2149.

DAVIDSON STEAM SHIP COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

The Clerk will enter *my* appearance as Counsel for the Plaintiff in Error.

H. R. SPENCER.
C. E. KREMER.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2149. Davidson Steam Ship Company, Plff. in Error, *vs.* United States of America. Appearance. Filed Nov. 28, 1904, John D. Jordan, Clerk. H. R. Spencer, C. E. Kremer, Counsel for Plff. in Error.

(*Appearance of Mr. C. E. Kremer as Counsel for Plaintiff in Error.*)

And on the twenty-fifth day of January, A. D. 1905, the appearance of Mr. C. E. Kremer as counsel for the plaintiff in error was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2149.

DAVIDSON STEAM SHIP COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

C. E. KREMER.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2149. Davidson Steam Ship Company, Plff. in Error, *vs.* United States of America. Appearance. Filed Jan. 25, 1905, John D. Jordan, Clerk. C. E. Kremer, Counsel for Plff. in Error.

(Appearance of Mr. Charles C. Houpt as Counsel for Defendant in Error.)

And on the twenty-third day of February, A. D. 1905, the appearance of Mr. Charles C. Houpt as counsel for the defendant in Error was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2149.

DAVIDSON STEAM SHIP COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

CHAS. C. HOUPT.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2149. Davidson Steam Ship Company, Plff. in Error, *vs.* The United States of America. Appearance. Filed Feb. 23, 1905, John D. Jordan, Clerk. Charles C. Houpt, Counsel for Deft. in Error.

(Order of Submission.)

And on the fifth day of May, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1905.

FRIDAY, *May* 5, 1905.

No. 2149.

DAVIDSON STEAM SHIP COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

In Error to the Circuit Court of the United States for the District of Minnesota.

This cause having been called for hearing in its regular order, argument was commenced by Mr. C. E. Kremer for plaintiff in error, continued by Mr. Charles C. Houpt for defendant in error and concluded by Mr. C. E. Kremer for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the seventh day of November, A. D. 1905, an opinion of said Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2149. September Term, A. D. 1905.

DAVIDSON STEAM SHIP COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Minnesota.

Mr. C. E. Kremer (Mr. H. R. Spencer was with him on the brief) for the plaintiff in error.
Mr. Charles C. Houpt for the defendant in error.

Before Sanborn, Hook and Adams, Circuit Judges.

This was an action by the United States against the Davidson Steam Ship Company for damages to a breakwater at Agate Bay, Two Harbors, Minnesota, alleged to have been caused by the negligent management of a vessel of that company. At the mouth of the bay and as breakwaters for the harbor two piers extend towards each other from the opposite shores. Between the ends of these breakwaters is the entrance to the harbor. Prior to the year 1900 the one from the east shore ran westward into the lake for a distance of about 750 feet. At the time of the accident the Government was engaged in extending it about 300 feet from the end of the old structure and at an angle of about forty-five degrees. The work was but partially completed; in some places the superstructure was barely above the level of the water. For years the Government had maintained as a warning at night a large red light near the outer end of the old structure. During the work on the extension it had for a similar purpose also maintained at the extreme end thereof a white light attached to a mast about fourteen feet above the water level. Between these two lights, a distance of 300 feet or more, was the unfinished work upon which the Government was engaged.

In the night of July 24, 1901, defendant's steamer Shenandoah, John McAvoy master, approached the harbor to gain admittance. The weather was somewhat boisterous with a heavy sea and a northeast wind blowing towards the shore. The master and crew of the vessel being ignorant of the extension of the east breakwater mistook the outer white signal for the light of a vessel at anchor and the red light for the signal at the end of the entire structure. The error was discovered too late to prevent a collision. The vessel struck against

the cribs of the extension about seventy-five feet from the sea end of the old breakwater and inflicted the damage complained of. The Government claimed that the master of the vessel was negligent in not availing himself of the usual source of information of Government works in navigable waters, which would have been sufficient in this case, and in disobeying the signals which were maintained. The defendant contended that the master's ignorance of the new work was excusable and that the signals were insufficient and not such as should have been given. The trial, which was to a jury, resulted in a verdict for the Government upon which judgment was rendered.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The Government called McAvoy, the master of the vessel, for cross examination as an adverse witness, claiming authority to do so under a Minnesota statute which provides that a party to the record in a civil action may so call and cross examine an adverse party, or if such adverse party is a corporation then its "directors, officers, superintendent or managing agents" and that the party calling for such examination shall not be concluded thereby but may rebut it by counter testimony. (G. S. 1894 sec. 5659.) Counsel for the defendant merely said: "We object to that." The objection was clearly insufficient. It has been held by this court many times that a trial court is justified in overruling an objection to a question or to the evidence sought to be elicited thereby when no ground is specified or when the ground mentioned is so general in form as to be insufficient to direct attention to the particular defect or objectionable feature relied on. (Eli Mining & Land Co. *v.* Carlton, 108 Fed. 24, 47 C. C. A. 166; Rhodes *v.* United States, 79 Fed. 740, 25 C. C. A. 186; Minchen *v.* Hart, 72 Fed. 294, 18 C. C. A. 570; Missouri Pacific Ry. Co. *v.* Hall, 66 Fed. 868, 14 C. C. A. 153; Tabor *v.* Bank, 62 Fed. 383, 10 C. C. A. 429; Burlington Ins. Co. *v.* Miller, 60 Fed. 254, 8 C. C. A. 612; Railway Co. *v.* Hensen, 58 Fed. 531, 7 C. C. A. 349; Ward *v.* Mfg. Co. 56 Fed. 437, 5 C. C. A. 538; U. S. *v.* Shapleigh, 54 Fed. 126, 4 C. C. A. 237.)

But had the objection now urged been properly presented to the trial court its action in overruling it would not have been erroneous. It is now contended that the master of the vessel was not a "superintendent or managing agent" of the steamship company within the meaning of the Minnesota statute. This question being one of the construction of a local statute has been set at rest by the decision of the Supreme Court of that state (Bennett *v.* Lumber Company, 77 Minn. 198. It was there said:

"The statute is a remedial one, and must be construed with reasonable liberality. To limit it, by construction, to the general officers of the corporation, as claimed by the defendant, would defeat the purpose of the statute; for, as a rule, such general officers have no personal knowledge as to what occurs in the actual work of the corporation. The statute includes any officer, superintendent or agent having supervision or control of the work or act of the corporation involved in the case, whether his rank be that of a general officer or not."

It is true that in the case cited the witness called for cross examination under the statute was the superintendent of a saw mill while here the witness was a master of a vessel upon the waters. But in applying a decision of the highest judicial tribunal of a state construing a local statute, to cases involving rights or liabilities which have subsequently accrued, we should not halt at the strict letter of the decision for the purpose of indulging in technical distinctions and then depart from the true logic and spirit thereof. It cannot be doubted that within the above construction of the statute a master in command of a vessel with authority to control and direct its movements between ports is, in respect of the performance of his duties, the managing agent of the corporation which employs him.

There were received in evidence over defendant's objection two marine notices sent from Washington, D. C., for distribution. One of them, dated July 29, 1899, related to the breakwater in question and contained this information:

"The breakwater at the east side of the harbor is built to the length of 750 feet; the proposed extension of 250 feet in the same direction has been abandoned and in its stead an extension at an angle of 45 degrees southward, 300 feet in length is proposed, making the entire length of this eastern breakwater 1050 feet. This is also to be finished in the year 1900."

The other, dated August 11, 1900, related to the same improvement and among other things recited:

"A communication from the contractor dated July 31, 1900, states that the submarine work on the extension of the east breakwater has now advanced so far as to leave only 16 feet of water over the embankment. Such a spot is located about 200 feet from the end of the old breakwater. Masters of vessels are therefore cautioned on entering the harbor to give the old breakwater a berth of 300 feet and not to round the east breakwater close on board, as formerly, on account of this danger."

The only objection made at the trial was that knowledge of these notices was not brought home to McAvoy. The objection was not well founded. Witness Heinrich, who was in charge of the Government's hydrographic office at Duluth, Minnesota, testified that it was his duty to send these and other such notices to the masters of steamships and sailing vessels in his district; that both McAvoy and the steamer Shenandoah were on his mailing list; and that he mailed both notices to McAvoy. He said that the notice of August 11, 1900, was mailed to him at Detroit, Michigan, in care of the marine post office, and McAvoy himself testified that he received his mail there. The proof of the mailing of the first notice was not so definite. Heinrich testified positively that he mailed it to him and, though he was not questioned as to the address, the reasonable inference from the testimony is that it was also sent to Detroit. But aside from this, the notice of August 11, 1900, referred to the former one by number and year and contained in itself substantially all the information that was material to the controversy. McAvoy denied their receipt, but he also said that whenever he passed Detroit, which he frequently did, the mail would be brought on

board and delivered to him; that he had received notices to mariners nearly every time he passed Detroit, but he paid very little, if any, attention to them. He knew, however, that they contained official information of changes and the commencement and progress of government works in the harbors of the great lakes which he visited.

The mailing of a letter or other communication properly addressed and otherwise conforming to the postal laws and regulations is evidence of the due delivery thereof. The denial by the addressee of its receipt is not conclusive; it merely raises a question for the determination of the jury. (Rosenthal *v.* Walker, 111 U. S. 185; Henderson *v.* Coke Co., 141 U. S. 25, 37; Atherton *v.* Atherton, 181 U. S. 155, 181; Provident Savings Life Assurance Soc. *v.* Nixon, 73 Fed. 144, 148, 19 C. C. A. 414.)

As to the contention now urged that the notices were immaterial it may be said that they were intended to supplement the warnings afforded by the signals placed about the works and were well calculated to attract and engage the attention of a prudent mariner.

It is also contended that the trial court erred in admitting in evidence exhibits "A" and "D." The former appears to be a chart or map of the locality of the collision. The latter is said in the brief of the company to be a pamphlet issued by the Government. In the assignment of errors, exhibit "A" and another exhibit are made the subject of one assignment. This is in violation of the provision of rule 11 of this court that each error asserted and intended to be urged "shall be set out separately." Again, the evidence alleged to have been erroneously admitted is merely referred to in the assignment of errors as exhibits "A" and "D." This is not a compliance with that provision of the same rule which requires that "the full substance of the evidence admitted" shall be quoted. It is also provided that "errors not assigned according to this rule will be disregarded." Again, by rule 24 counsel are required to make references in their briefs to the pages of the record which they desire to have examined. But nowhere in the brief of the company is there a reference to the pages of the voluminous record before us where can be found the testimony concerning exhibits "A" and "D," what were the objections to their admission in evidence, what the rulings of the trial court thereon and whether exceptions were taken to such rulings. Compliance with these rules is necessary to facilitate the business of the court and it imposes no hardship upon counsel whose participation in the trial or in the preparation of the brief or both has made them familiar with the contents of the record. Attention has been called to these rules many times and they have been frequently enforced, as they should be in this case.

The steamship company offered in evidence a notice to mariners issued by the Government about three months after the collision which described the extension of the breakwater, and directed attention to the white light at the outer end thereof and the red light near the sea end of the old structure. It was excluded by the trial court. It is claimed that it should have been received as "evidence of what the Government should have done prior to the disaster."

It is the settled doctrine of the courts of the United States that the

taking of additional precautions after the occurrence of an accident is not evidence of want of care in the past. (Columbia Railroad Co. *v.* Hawthorne, 144 U. S. 202; Southern Pacific Co. *v.* Hall, 100 Fed. 760, 41 C. C. A. 50; Motey *v.* Marble & Granite Co., 74 Fed. 155, 20 C. C. A. 366; Cincinnati etc. R. Co. *v.* Van Horne, 69 Fed. 139, 16 C. C. A. 182; Barber Asphalt Pav. Co. *v.* Odasz, 60 Fed. 71, 8 C. C. A. 471; Atchison etc. R. Co. *v.* Parker, 55 Fed. 595, 5 C. C. A. 220.)

Finally, it is claimed that the white light displayed at the end of the new work was misleading, that a red light should have been used instead and that there was not sufficient evidence to support the verdict. It did not appear, however, that there was any law, rule or regulation which specified the particular kind of light to be used in such cases. There was substantial evidence tending to show that for many years it had been the custom to display white lights, not red ones, upon unfinished works in the harbors of the great lakes, and that McAvoy knew such works were constantly going on; that the light-house board which maintained red lights as warnings and for the direction of mariners upon completed structures did not have jurisdiction of works in process of construction; that McAvoy knew that he could easily procure, for the asking, official publications which gave accurate information to mariners regarding harbor works in the course of construction; that the Government, not waiting for requests, was constantly endeavoring to convey such information to him and to others in like occupation for their safety and for the security of navigation; that some such publications had been sent to and had been received by him; advising him of the very structure he ran his vessel against, but that he paid no attention to them. We are unable to say that the deductions which the jury drew from this and other evidence in the case were not reasonable and well founded.

The judgment is Affirmed.

Filed November 7, 1905.

(*Judgment.*)

And on the seventh day of November, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1905.

TUESDAY, *November* 7, 1905.

No. 2149.

DAVIDSON STEAM SHIP COMPANY, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA.

In Error to the Circuit Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

November 7, 1905.

(*Motion of Plaintiff in Error for Order Staying Mandate.*)

And on the eighth day of January, A. D. 1906, a motion of plaintiff in error for an order staying the mandate was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

U. S. Circuit Court of Appeals for the Eighth Circuit.

DAVIDSON STEAMSHIP CO.,
vs.
UNITED STATES.

And now comes the plaintiff in error in the above cause & moves that the mandate be stayed for 30 days pending the allowance of a Writ of Error by the Supreme Court in which Assignment of Errors and petition for a Writ of Error and bond have already been filed.

C. E. KREMER,
Att'y for Pl'ff in Error.

Dated Jan'y 6, 1906.

(Endorsed:) No. 2149. Davidson Steam Ship Co., Plff. in Error, *vs.* United States of America. Motion Plff. in Error for order staying mandate. Filed Jan. 8, 1906, John D. Jordan, Clerk.

(*Order Staying Mandate.*)

And on the eighth day of January, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order staying the mandate in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1905.

MONDAY, *January* 8, 1906.

No. 2149.

DAVIDSON STEAM SHIP COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA.

In Error to the Circuit Court of the United States for the District of Minnesota.

Upon the motion of plaintiff in error it is ordered that the mandate in this cause be and the same is hereby stayed for a period of

thirty days from this date, pending an application to Supreme Court of the United States for a writ of error herein.

(*Petition for Writ of Error.*)

And on the eleventh day of January, A. D. 1906, a petition for a writ of error was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Eighth Circuit.

DAVIDSON STEAMSHIP COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Petition for Writ of Error.

Your petitioner, the Davidson Steamship Company, plaintiff in error in the above entitled cause, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that a judgment has therein been rendered on the 27th day of November, 1905, affirming the judgment of the Circuit Court of the United States for the District of Minnesota, and that the matter in controversy in said suit exceeds $1000.00, besides costs, and that the jurisdiction of none of the Courts above mentioned is, or was dependent in any wise upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of the different States, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty cause, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error. And therefore, your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the Assignment of Errors herewith filed by said plaintiff in error, may be reviewed and if error be found corrected according to the laws and customs of the United States.

DAVIDSON STEAMSHIP CO.,
By C. E. KREMER, *Its Att'y.*

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff's giving bond according to law, in the sum of $6000.00.

____ ____,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) No. 2149. Supreme Court of U. S. Davidson S. S. Co. *vs.* United States. Petition for Writ of Error. Filed Jan. 11, 1906, John D. Jordan, Clerk. C. E. Kremer & H. A. Kelley, Proctor for Petitioner.

(*Assignment of Errors.*)

And on the eleventh day of January, A. D. 1906, an assignment of errors was field in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Eighth Circuit.

DAVIDSON STEAMSHIP COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Assignment of Errors.

Now comes the plaintiff in error, the Davidson Steamship Company, and files the following assignment of errors upon which it will rely in the prosecution of the writ of error in the above entitled cause:

1st: That the Court erred in admitting the witness Powell to testify as to what is the usual light used for improvements under construction such as the breakwater at Two Harbors, at the time in question, against defendant's objections, to which ruling the defendant excepted.

2nd: The Court errer in overruling defendant's objection to the following question asked by plaintiff's counsel to the witness Wetton.

Q. Do you know what the character of the light was that is used as a warning or danger signal upon these works you have been engaged in. What is the nature of the light? To which ruling of the Court the defendant excepted.

3rd: That the Court erred in overruling defendant's objection to the following question asked the witness Krey in direct examination, and objected to by defendant.

Q. Did you ever see in the whole course of your work any other light than a white light upon the Government work in progress of construction upon the Great Lakes. To which ruling of the Court the defendant excepted.

4th: That the Court erred in overruling defendant's objection to the following question asked the witness Krey, in direct examination by plaintiff.

Q. During that time do you know what kind of lights the government officers or contractors, I mean Government officers, put out as signals for (mariners) upon these works, that are in process of construction? To which ruling of the Court defendant excepted.

5th: That the Court erred in admitting in evidence Plaintiff's Exhibit A. and B, against the objection of defendant, to which ruling of the Court the defendant excepted.

6th: That the Court erred in admitting in evidence Plaintiff's Exhibit C. against the objection of the defendant, to which ruling of the Court the defendant excepted.

7th: That the Court erred in overruling defendant's objection to the following question asked the witness Henrich.

Q. The lighthouse board does not give warning with regard to lights or take any notice of lights that are upon construction or improvements that are in the hands of the engineers?" To which ruling of the Court the defendant excepted.

8th: That the Court erred in overruling defendant's objection to the introduction in evidence of Plaintiff's Exhibit D, to which ruling of the Court the defendant excepted.

9th: That the Court erred in overruling defendant's objection to the following question asked the witness Gaillard in direct examination, by plaintiff.

Q. Captain, state what kind of a light was displayed on the new work that you have described as having been performed during the time you were located here at Duluth, to which ruling of the Court the defendant excepted.

10th: That the Court erred in overruling defendant's objection to the following question asked the witness Gaillard, in direct examination.

Q. Do you know whether or not it is customary for masters of vessels to procure these maps as aids to navigation? To which ruling of the Court the defendant excepted.

11th: That the Court erred in overruling defendant's objection to the following question asked in (direct) examination of the witness Howard, by plaintiff.

Q. What is the custom of masters of vessels as to receiving notices of that nature, (referring to Exhibits B and C), to which ruling of the Court the defendant excepted.

12th: That the Court erred in overruling defendant's objection to the following question asked the witness Howard, by plaintiff in direct examination.

Q. State whether or not it is customary for mariners of vessels to obtain these notices to mariners issued by the Hydrographic office? To which ruling of the Court the defendants excepted.

13th: That the Court erred in overruling defendant's objection to the following question asked the witness Howard, by plaintiff in direct examination.

Q. In your experience and observation as a sailor do you know the kind of light that is displayed in harbors upon breakwaters and piers in the district, during the process of construction by the Government? To which ruling of the Court the defendant excepted.

14th: That the Court erred in overruling defendant's motion to dismiss the case at the conclusion of plaintiff's evidence, to which ruling of the Court defendant excepted.

15th: That the Court erred in excluding as evidence a notice to mariners dated at Washington, October 19th, 1901, offered by defendant, which notice described the light used on the extension of the pier work in question. To which ruling of the Court defendant excepted.

16th: That the Court erred in refusing to allow defendant to ask the following question of the witness Heinrich.

Q. Suppose that as a mariner you were bound for the Port of Two Harbors on a dark night, and should see a white light several hundred feet off from the regular beacon light which is a red light, there at Two Harbors, what would a mariner ordinarily take such a light to be there, or to represent without knowledge of the extension of an obstruction which might be lighted up that way? To which ruling the defendant excepted.

17th: That the Court erred in sustaining plaintiff's objection to the following question asked the witness Heinrich by defendant.

Q. If the light house board had prescribed a red light to mark the end of the breakwater at Agate Bay what do you say as to the propriety of using a white light to mark the extension of that breakwater? To which ruling the defendant excepted.

18th: That the Court erred in refusing to permit defendant to show by the witness Krey that another vessel had collided with that breakwater at Two Harbors, by reason of the moving of the red light marking the outer end of the breakwater, prior to the collision in question. To which ruling defendant excepted.

19th: That the Court erred in refusing to receive in evidence a letter written by the witness Krey who was in charge of the construction of said breakwater, to the plaintiff's officer in Duluth having charge of said works at Two Harbors, prior to the collision in question, calling his attention to the moving of the red light, back from the outer end of the breakwater, and that a white light was used to mark the submerged portion of the breakwater extension. To which ruling of the Court the defendant excepted.

20th: That the Court erred in sustaining plaintiff's objection to the following question asked the witness Girard by defendant.

Q. What to a mariner in a bay like Agate Bay, would a single stationary red light indicate, I mean outside of a regular light house? To which ruling the defendant excepted.

21st: That the Court erred in denying defendant's motion to direct a verdict for the defendant at a conclusion of the evidence, for the reason that no negligence was shown on the part of the officers or crew of defendant's vessel, and for the further reason that the evidence shows that the plaintiff was guilty of such contributory negligence as to bar a recovery. To which ruling the defendant excepted.

22nd: That the Court erred in charging the jury as follows: "Negligence is the failure of a person or party in any situation in which he may be placed to fulfill and perform those duties which the law imposes upon him. If he fails to perform those duties and by that failure or by reason of that failure injury comes to any person then that person is entitled to recover such damages as results directly from the injury.

23rd: That the Court erred in refusing to give the following instructions to the jury, as requested by the defendant:

2nd: The Court instructs you as a matter of law that while the use of a white light to mark the extension of a breakwater is not prohibited by law, yet it was the duty of those in charge of the breakwater extensions in question, to use such a light or lights as would not be misleading to mariners. The Government lighthouse book

issued to mariners for use that season states that the outer end of the breakwater at Two Harbors was marked by a red light. The Court instructs you that if a change of lights was made by the Government and some other than a red light was used to mark the actual outer end of said breakwater, notice of such change should have been given by the Government, and if such failure contributed to the collision your verdict should be for the defendant".

4th: If you shall find from the evidence that no notice was ever given by the government of the use of a white light to mark the actual outer end of the breakwater at that place, the officers of the Shenandoah, on approaching the port of Two Harbors at night as they did, had a right to rely upon the government instructions as indicated in its published lighthouse book, namely that a red light marked the outer end of the breakwater.

6th: The Court instructs you that if the plaintiff maintained upon the end of the extension of the government pier, at the time in question, a white light which was not known to the officers of the Shenandoah as marking such extension, and they, in the exercise of reasonable care, could not see or know it as marking such extension, and they were mislead by the color of the said light into the belief that it was the light of a vessel at anchor in the harbor, then your verdict should be for the defendant". To which defendant excepted.

24th: The Court erred in not granting defendant's motion for judgment notwithstanding the verdict, or to grant a new trial in the case, to which ruling of the Court the defendant excepted.

25th: That the Court erred in sustaining plaintiff's objection to the introduction in evidence of defendant's Exhibit", to which ruling defendant excepted.

26th: That the Circuit Court of Appeals erred in holding that the notices sent out by the Government dated July 29th, 1899, were admitted in evidence as having been received by John McAvoy, Master of the Steamer Shenandoah.

27th: That the Circuit Court of Appeals erred in holding that the notice of the Government, sent out August 11th, 1900, was received by John McAvoy, Master of the Steamer Shenandoah.

28th: That the Circuit Court of Appeals erred in holding that the Government's Exhibits A and D were admissable in evidence.

29th: That the Circuit Court of Appeals erred in holding that the notice to mariners, issued by the Government, after the disaster, describing the condition of the breakwater and the light upon the same, as they were on the night of the disaster, were admissable in evidence.

30th: That the Circuit Court of Appeals erred in holding that the white light displayed at night on the end of the new work of the breakwater, was a proper light to be exhibited on such work and in such place as Two Harbors, Minnesota.

31st: That the Circuit Court of Appeals erred in not holding that the Government should have displayed upon the new work at night a red light.

32nd: The Circuit Court of Appeals erred in holding that John

McAvoy, Master of the Steamer *Shendoah,* knew that works like the new extension of the breakwater with which the Shenandoah collided, always displayed white lights.

33rd: That the Circuit Court of Appeals erred in holding that the Government was not bound to display a red light in place of a white light, on partially submerged work of harbor construction when the same was intended to be an extension of a breakwater across a Bay like Agate Bay at Two Harbors, Minnesota.

34th: That the Circuit Court of Appeals erred in holding that John McAvoy had received notice by publication, from the Government advising him of the very structure that he ran his vessel against, and that he paid no attention to it or them.

35th: That the Circuit Court of Appeals erred in affirming the decision of the Circuit Court of the United States for the District of Minnesota.

36th: The Circuit Court of Appeals erred in not reversing the decision of the Circuit Court of the United States for the District of Minnesota.

Wherefore, the plaintiff in error, the Davidson Steamship Company, prays that the judgment of the Circuit Court of Appeals for the Eighth Circuit and the Circuit Court of the United States for the District of Minnesota, Fifth Division, be reversed and that the said Circuit Court be directed to grant a new trial of said cause.

CHARLES E. KREMER,
H. A. KELLEY,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 2149. Supreme Court of U. S. Davidson S. S. Co., *vs.* United States. Assignment of Errors. Filed Jan. 11, 1906, John D. Jordan, Clerk. C. E. Kremer, H. A. Kelley, Proctor for Petitioner.

(*Bond.*)

And on the eleventh day of January, A. D. 1906, a bond on writ of error was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

Supreme Court of the United States.

UNITED STATES OF AMERICA, Plaintiff,
vs.
DAVIDSON STEAMSHIP COMPANY, Defendant.

Know all men by these presents that the Bankers Surety Company, of Cleveland, Ohio, are held and firmly bound unto the United States of America in the full and just sum of Six Thousand Dollars ($6000), to be paid to the United States of America, to which payment, well and truly to be made, we bind ourselves, our successors and assigns firmly by these presents.

Sealed with our seal- and dated this second day of January, 1906.

Whereas, lately at the Circuit Court of Appeals for the Eighth Circuit, in a suit pending in said Court between the United States of America, plaintiff, and the Davidson Steamship Company, defendant, a judgment of the Circuit Court of the United States for the District of Minnesota was affirmed and rendered against the said Davidson Steamship Company, and

Whereas, the said Davidson Steamship Company has or is about to obtain a writ of error to the said Circuit Court of Appeals for the Eighth Circuit, to reverse its judgment and the judgment of the Circuit Court of the United States for the District of Minnesota in the aforesaid suit, and

Whereas, a citation has been, or is about to be directed to the said United States of America, citing and admonishing it to be and appear in the Supreme Court of the United States at the City of Washington sixty (60) days from and after the date of said citation.

Now, therefore, the condition of the above obligation is such that if the said Davidson Steamship Company shall prosecute its said writ of error to effect and answer all damages and costs, if it failed to make good its plea, then the above obligation to be void, otherwise to remain in full force and virtue.

THE BANKERS SURETY COMPANY. [SEAL.]
HARVEY D. GOULDER, *President.*

Attest:
P. W. HARVEY, *Secretary.*

Sealed and delivered in the presence of:
C. E. KREMER.

Bond approved:
DAVID J. BREWER,
Justice Sup. Ct.

(Endorsed:) No. 2149. Supreme Court of U. S. Davidson S. S. Co. *vs.* United States. Bond. Filed Jan. 11, 1906, John D. Jordan, Clerk. C. E. Kremer, H. A. Kelley, Proctor- for Petitioner.

(*Writ of Error.*)

And on the eleventh day of January, A. D. 1906, a writ of error was filed in the Clerk's office of said Circuit Court of Appeals in said cause, the original of which with the Clerk's return endorsed thereon is hereto attached and herewith returned:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Davidson Steam Ship Company, plaintiff in error, and The United States of America, defend-

ant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of January, in the year of our Lord one thousand nine hundred and six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 2149. Davidson Steam Ship Co., Plaintiff in Error, *vs.* United States of America. Writ of Error. Filed Jan 11 1906 John D. Jordan, Clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit, ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name, and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this seventeenth day of January, A. D. 1906.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(*Citation.*)

And on the seventeenth day of January, A. D. 1906, a citation was filed in the Clerk's office of said Circuit Court of Appeals in said cause, the original of which with the admission of service endorsed thereon is hereto attached and herewith returned:

UNITED STATES OF AMERICA, *ss:*

To The United of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Eighth Circuit wherein Davidson Steam Ship Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States, this 8th day of January, in the year of our Lord one thousand nine hundred and six.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

Service of the above citation admitted.

CHAS. C. HOUPT,
U. S. Attorney & Att'y for Def't in Error.

1/15/06.

[Endorsed:] No. —. Davidson Steam Ship Co., Plaintiff in Error *vs.* United States of America. Original Citation. Filed Jan. 17 1906 John D. Jordan, Clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing two hundred twenty-two pages contain a true copy of the portions of the transcript of the record printed pursuant to the stipulation of the parties and upon which said cause was heard and full, true and complete copies of all record entries and proceedings, including the opinion, in said Circuit Court of Appeals, in a certan cause in said Court wherein the Davidson Steam Ship Company was Plaintiff in Error and The United States of America was Defendant in Error, No. 2149, September Term, 1905, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original writ of error with the Clerk's return endorsed thereon and the original citation with the admission of service endorsed thereon are hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this seventeenth day of January, A. D. 1906.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 20,124. U. S. circuit court of appeals, eighth circuit. Term No. 622. Davidson Steam Ship Company, plaintiff in error, *vs.* The United States of America. Filed March 12th, 1906. File No. 20,124.

FILE COPY.

Office Supreme Court U. S.
FILED
SEP 14 1906
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1905.

No. [illegible].220

DAVIDSON STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

CHARLES E. KREMER,
HERMON A. KELLEY,
Attorneys for Plaintiff in Error.

GEO. HORNSTEIN CO., PRINTERS, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1905.

No. 622.

DAVIDSON STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

On the night of the 24th day of July, 1901, the steamer Shenandoah, loaded with a cargo of about thirty-three hundred tons of iron ore and bound from Superior, Wisconsin, to Two Harbors, Minnesota, ran into the Government breakwater at the latter place.

Agate Bay, Lake Superior, is the harbor of the village of Two Harbors and is an open bay, across the mouth of which there are breakwaters extending from either shore running in an easterly and westerly direction, leaving an open space as an entrance to the iron ore and other docks in the bay.

The breakwater which extends from the easterly side of the bay had been constructed for a number of years and extended in a westerly direction at right angles across the mouth of the bay, a distance of about seven hundred and fifty feet, and the end of this breakwater had been marked by a large fixed red light on a timber frame work some fifteen or twenty feet above the breakwater.

On the other side of the mouth of the bay, extending in an easterly direction from the west shore of the bay, was a similar breakwater without any light, leaving, therefore, an opening of about 1,500 feet through which vessels entered the bay. In 1899 the government projected an extension of the easterly breakwater, which was to extend at an angle of forty-five degrees from the original breakwater a distance of about three hundred feet.

At the time of the collision this extension of the breakwater composed of wooden cribs filled with stone, had been extended its full length, but not built up, and, therefore, was only a few inches above the surface of the water. The extreme outer end of the new extension had erected on it a mast or pole about twelve feet high and on this was hung an ordinary white light, or lantern. The original fixed red light on the old breakwater had been moved back some thirty feet from this breakwater in order that the new work of the breakwater might be properly joined to the old work.

The testimony shows that Captain McAvoy, in command of the steamer Shenandoah, loaded a cargo of iron ore at Superior, Wisconsin, and then proceeded to Two Harbors for the purpose of taking

in tow a barge which was being loaded there. It was dark and stormy when the Shenandoah left Superior, and the sky was covered with clouds, there was a heavy wind blowing from the northeast, making a high sea. The Shenandoah arrived off Two Harbors at about 11 o'clock p. m., and ran northeast of the harbor in order to get directly before the northeast wind and thereby make a safer entrance. The steamer's speed was checked and she was headed for the entrance, intending to turn and enter port as she had formerly done close to the red light. When she had approached within about two hundred feet of the new breakwater the surf was seen breaking on it, and her engine was promptly stopped and reversed, but notwithstanding this she struck the extension of the new breakwater about one hundred and twenty-five feet from the fixed red light, doing considerable damage to the breakwater, but without any injury to herself.

Captain McAvoy testifies that on the way over from Superior to Two Harbors he examined a book (Defendant's Exhibit "I") published by the Lighthouse Board as a guide to navigation, showing lights, breakwaters, etc., an extract of which is in evidence and found at page 177, and from this he learned that the light on the breakwater at Two Harbors was a fixed red light. He testifies also that he did not know that the breakwater was being extended, had no information as to its existence, and the first knowledge that he had that it was there was when he saw the sea breaking over it about two hundred feet away, and after that he made every effort to avoid striking it.

It is contended on behalf of the Government that the defendant was guilty of negligence in that the master of the Shenandoah was bound to know of the existence of the breakwater and, therefore, it was negligence to collide with and injure it.

On behalf of the defendant we contend:

First. That the existence of the breakwater was not known, and that it could not, in the darkness, be seen in sufficient time to be avoided.

Second. That no negligence is shown on the part of the master of the Shenandoah.

Third. That the evidence shows such contributory negligence on the part of the Government that there is no right of recovery.

The specific negligence of the Government consists:

First. In not having published or given notice of the actual construction or location of the breakwater.

Second. In not giving notice of the white light which was being displayed to mark it.

Third. In giving misleading notices indicating that the breakwater was completed and that the end of it was marked by a red light.

Fourth. In using a white instead of a red light to mark the outer end of the breakwater.

A trial of the issues was had before a jury at Duluth, Minnesota, and at the close of the plaintiff's evidence a motion was made to the court to direct a verdict in favor of the defendant. This motion was overruled, and was again made at the close of

all the evidence and overruled a second time. The case then went to a jury and they found a verdict in favor of the Government for the sum of four thousand and twelve dollars and fifty cents. The motion for a new trial was overruled, and thereupon assignment of errors were filed and the case removed to the United States Circuit Court of Appeals for the Eighth Circuit. Here the judgment of the Circuit Court was affirmed.

Thereupon assignment of errors were filed in the Court of Appeals and the case removed to this court.

ARGUMENT.

Agate Bay, the harbor of the port of Two Harbors, Minnesota, is about twenty-seven miles from Duluth, and one of the most important iron ore loading ports on the great lakes.

Exhibit "A" of the record, page 181, is a chart of Agate Bay introduced by the Government, and shows that a harbor is made of this bay by constructing breakwaters across its opening into Lake Superior. The original breakwaters ran out from each shore across the mouth of the bay on each side for a distance of some seven hundred and fifty feet. The projected extension of the east breakwater out into the bay was an obstruction to navigation placed almost directly across the course and path of every vessel that might come in or go out of the bay. It was an obstruction of the most dangerous kind to

vessels. It was much more so than the usual harbor piers are. These usually extend out into the open water of the lake and an entry between them requires approaching them so that they obstruct only to the extent of their width, and not their length, and whether they be long or short is a matter of indifference to the mariner who approaches them "end on," as it were. The character of this extension of the breakwater at Agate Bay was entirely different. It was across the course of vessels and not parallel with that course. The character of this alleged improvement was such that its dangers to vessels and navigators would suggest that proper notice of its projected construction should be given and published so that it might become known to all mariners who would desire to enter Agate Bay. Not alone should notice be given of the projected construction, but the greatest publicity should have been given to the progress of the work as soon as it became in any way a menace to navigation. Only the widest publicity of the construction of this extension of the breakwater could prevent disaster, both to incoming and outgoing vessels, and to the work itself. It was, therefore, the duty of the Government to widely publish and disseminate notice of the projected work and its progress.

In addition to this, as soon as the work carried on there, became an actual obstruction, signals and warnings should be so displayed as to effectually bring home notice to the mariner that there was danger, so that damage to the vessel and the structure might be avoided. In displaying a signal and a warning to mariners, it is important that it be of

such a character that it would be understood as such by the mariner. It was unimportant to the *man on land* because he was in no way interested. He was not using the harbor or the breakwater for any purpose; it was only a danger to the navigator and, therefore, it was he that was to be warned, and a signal which would warn him was the only efficient signal which the Government could safely employ. It must be a signal which would be understood by mariners as a signal of warning and danger. It should have been such a signal as could not have been mistaken as meaning something else. This work at the time of this disaster, was but a few inches above the surface of the water for the entire three hundred feet of its length. In the daytime it could be readily seen a sufficient distance away so that it could be avoided, but at night it was impossible to see it, and a light, or lights, were absolutely necessary to apprise the incoming mariner of its presence.

The Government contends that it gave notice of the projected extension of the breakwater by sending out the printed notices to mariners as follows:

July 29th, 1899, Exhibit "B."

August 11th, 1900. Exhibit "C."

It also claims that Exhibit "A," a chart of Agate Bay showing the projected breakwater in dotted lines, could have been purchased by mariners at Detroit, Michigan.

It further states that at different offices on the great lakes Exhibit "D," a bulletin of the Engineers' department, could be had on application (p. 59). In addition to these the Lighthouse Board

had issued its List of Lights, etc., corrected to the opening of navigation, 1901. (Defendant's Exhibit I.) These are all the notices that were issued by any department of the Government prior to this disaster.

The work of construction was done under the supervision of the War Department represented by Captain Gaillard, Corps of Engineers.

The notices to mariners (Exhibits B and C) were sent out by the hydrographic office of the Navy Department at Duluth. The lights and light houses were under the charge of the Light House Board of the Treasury Department, and since its establishment, are under the charge of the Department of Commerce and Labor, and were to be found in a publication issued by this board. Three independent departments of the Government were therefore interested in this work so far as it concerned the navigators of Lake Superior and Agate Bay.

It will be seen (p. 59) that the War Department, under whose supervision this work was done, *did not publish or send out to vessel owners or masters any notice of the projected work, or of what was being done during the process of construction,* neither did it keep the Navy Department informed of what it was doing so that the latter could send out notices to mariners through the hydrographic office. All that it did, was to issue and deliver its own bulletins to its subordinates and these bulletins could be had on application. The actual notice it had nothing to do with, and did not furnish to any one, *not even to the other departments of the Government, whose duty it was to inform the mariners by publishing and*

sending directly to them the notices of what was being done.

It is not claimed that any notice of the actual construction of the breakwater or what its condition was on the night of the disaster, or what light it bore, was ever sent out prior to the disaster. The court refused to permit the defendant to show that it was sent out afterwards on October 19th, 1901.

We contend:

First. That the notices which the Government sent out to mariners, Exhibits "B" and "C," were either never sent to Captain McAvoy, master of the Shenandoah, or were not received by him.

Second. That had he received and read them, they would not have informed him of the obstruction which he encountered and collided with.

As to the chart, Exhibit "A," we contend:

First. That while it might have been had on application, it was not the duty of Captain McAvoy to look for or purchase the chart, as the Government sent out notices to mariners, containing all the information needed.

Second. Had it been in his possession it would not have apprised him of the presence of the obstruction, but would, on the other hand, have shown him that where he attempted to enter port, there was a sufficient depth of water for him to do so with perfect safety.

As to Exhibit "D," the testimony of Captains Leisk, Chilson, Lyons, Frank McAvoy and Allen shows that it was not usual, or the practice of ship-

masters to call at the Engineer's offices for these pamphlets or the information they contained, nor did it contain the information of the actual condition of the breakwater on the night of the disaster.

We say, therefore, that there was no such notice of this new breakwater brought home to Captain McAvoy as to put him on his guard, and cause him to look for and avoid it. That being so, was the breakwater so lighted as to warn a master of ordinary skill, exercising ordinary care in entering Agate Bay at night, and apprise him of the dangerous condition of this submerged obstruction?

The light house book of 1901 notified mariners that the *end* of the breakwater was marked by a fixed red light. The notices, Exhibits "B" and "C," were, as we shall see, misleading in that they would lead the mariner to suppose that the extension was completed in 1900, and would therefore lead him to infer that the fixed red light was on the end of the completed breakwater.

But, the Government claims that in using an ordinary white light displayed from a pole at the extreme outer end of the breakwater it was notifying mariners that there was an obstruction out beyond the red light, which its lighthouse book said was on the end of the breakwater. As to this we say that the light used by the Government was a wrong and misleading light, because it would be, and was, mistaken for an anchor light displayed by a vessel at anchor in the Bay, such a light as the law requires shall be shown by a vessel at anchor. It was, therefore, a misleading light, one that would deceive and not guide the mariner. It was the mariner who was

to be warned, and the Government was bound to use a light that would warn him, no matter what it might mean to others. Would a white light warn him? It would not. It would lead him into destruction and not to safety. It would turn him toward the danger and not away from it. It was, therefore, negligence on the part of the Government to use such a light.

The Government should have displayed such a light as could not be misunderstood by mariners. A light that meant to them that there was present danger; such a light was, and is, a red light on land or at sea. It is well known as a danger signal. It cannot, when stationary, be taken for anything else. It then means but one thing, and that is danger. It would mean to the mariner to pause, to investigate and learn where and what the danger was. It would moreover have complied with the notice of the light-house board to the effect that the end of the breakwater was marked by a red light and would have made that notice truthful instead of false and misleading. Had such a light been used Captain McAvoy would have seen two red lights and would have stopped or approached so slowly that he could have stopped in time to avoid the breakwater over which the northeast sea was breaking and flashing white in the darkness.

We will now take up these different points in their order, as to each of which assignment of errors have been filed.

EXHIBIT "B," BULLETIN OF THE HYDROGRAPHIC OFFICE ISSUED JULY 29, 1899.

The first notice of this projected breakwater which the Government claims it sent out, was a bulletin sent out by the hydrographic office at Duluth. It was dated July 29th, 1899, therefore nearly two years after the disaster occurred. It was offered in evidence by the Government (Rec., p. 42) and objected to by the defendant.

The court overruled the objection and it was admitted in evidence. To this ruling an exception was taken and error was assigned (see 6th Error, 189). The bulletin is as follows (Rec., 176):

> "(703) Lake Superior—Minnesota—Two Harbors—information concerning breakwater—Depth alongside docks—The following information concerning the Government breakwaters at Two Harbors was obtained from Mr. J. H. Darling, U. S. Assistant Engineer:
>
> "The breakwater at the west side of the harbor is built to the length of 750 feet, 150 feet to be added and finished in the year 1900.
>
> "The breakwater at the east side of the harbor is built to the length of 750 feet; the proposed extension of 250 feet in the same direction has been abandoned and in its stead an extension at an angle of 45 degrees southward 300 feet in length is proposed, making the entire length of this (eastern) breakwater 1,050 feet. *This is also to be finished in the year 1900.*
>
> "Information has been received from Mr. R. Angst, Chief Engineer of the Duluth and Iron Range Railway, that the least water on both sides of all the ore docks in Agate Bay, Two Harbors, is 20 feet, 18 feet on both sides of the merchandise dock, and the same depth on the southwest side of the coal dock."

Our objection to this notice is:

First. That the evidence does not show that it ever came to the hands of Captain McAvoy, or was seen by him, or that he in any manner became acquainted with the information it contained.

Second. That it did not amount to a notice of the construction of the breakwater with which the Shenandoah collided.

The only evidence in relation to the point of this notice having reached Captain McAvoy is found in the testimony of the officer in charge of the hydrographic office at Duluth.

Captain Heinrich, the hydrographer, page 42, says:

> "Q. Do you know whether Captain John McAvoy of the steamship Shenandoah was on the list at that time? A. Yes.
>
> "Q. Do you know whether you mailed a bulletin, or a copy of a bulletin, to Captain John McAvoy? A. Yes, sir."

There is nothing in this evidence to show where this bulletin was sent to, and nothing to indicate where the home or place of residence of Captain McAvoy was. The evidence simply is that he mailed one to Captain McAvoy without designation as to how he directed it, or to what point, and no evidence whatever that it was received by him.

Captain McAvoy testifies that he received bulletins but he has no recollection of having received this one, nor is there any evidence that any he received were received from the Duluth office. They might have come from some other hydrographic offices on the chain of lakes, and referred to work

going on elsewhere. The evidence, therefore, is not sufficient to show, even under the most liberal allowance of the rule, that the bulletin was enclosed and directed and mailed to Captain McAvoy at his home, residence or any place where he was liable to receive it. Unless the evidence shows that it was addressed to him at a place where he was liable to receive it, it is inadmissible unless it appears that it was received by Captain McAvoy. There is no such evidence in the record. On the contrary, he said he had no recollection of having received it.

Third. The contents of the bulletin do not amount to a notice. It simply states that an extension of 300 feet at an angle of 45 degrees is to be made of the east breakwater so that its entire length will be 1,050 feet, and:

This is also to be finished in the year 1900.

This last clause completely destroys the efficiency of this notice as such in this case. Had Captain McAvoy had this notice in his hands at the time, without any other notice he would have done just what he did, because he would have supposed that the extension had been finished in 1900, and that the red light which had always marked the end of the breakwater was marking the end of the extended and completed breakwater, and that it was perfectly safe to round it, as formerly. The lighthouse book which he consulted stated the end was marked by a red light. In the darkness he could not tell whether the breakwater was 750 or 1,050 feet in length. If the government notice was a reliable one and the lighthouse book could be depended on, he would be justified in passing around the red light

just as he attempted to do on the night of the collision. It is certain, at least, that there was nothing in this notice which indicated that there would be a different light to mark the extension, and he would be justified in assuming that the permanent red light would, when the extension was made, mark the extreme end, as it always had, and as the lighthouse book stated, it did. His bulletin, therefore, even had he known its contents, would not have told him there was danger, or that the breakwater had not been completed.

EXHIBIT "C," BULLETIN OF THE HYDROGRAPHIC OFFICE OF AUGUST 11TH, 1900.

As the next notice from the Government, in order of time, came the bulletin of the hydrographic office dated August 11th, 1900. (Plaintiff's Exhibit C.) This consists of an octavo pamphlet, entitled: Notice to Mariners, published weekly by the hydrographic office, No. 32, Washington, D. C., August 11th, 1900. It was sent out from Duluth.

The portion of said exhibit particularly referred to, and offered in evidence, is as follows:

> "859.) Lake Superior—Minnesota—Two Harbors—Breakwater—Caution. Referring to notice to Mariners, No. 30 (703), of 1899, further information has been received that all the work on the extension of the breakwater piers at Two Harbors has been actively carried on by the Government since the opening of navigation.
>
> "A communication from the contractor, dated July 31st, 1900, states that the submarine work on the extension of the east breakwater has now advanced so far as to leave only sixteen feet of water over the embankment. Such a spot is lo-

cated about 200 feet from the end of the old breakwater.

"Masters of vessels are therefore cautioned on entering the harbor, to give the old breakwater a berth of 300 feet, and not to round the east breakwater close on board, as formerly, on account of this danger."

We objected to the introduction of this circular: *First*, because there was not sufficient evidence that it had been sent to or received by Captain McAvoy. *Second*, that it did not amount to the notice of the existence of the breakwater with which the Shenandoah collided.

First. The Government relied upon the evidence of Heinrich, the hydrographer at Duluth, to establish the fact that Captain McAvoy had received this notice. On cross examination, page 42, the witness states:

Q. How do you know you sent this to Captain McAvoy? A. From our mailing list. Captain McAvoy's name and the steamer he is master of is on our mailing list.

Q. Does anything on that notice say that if it is not called for it will be returned to this office? A. No, sir.

Q. Then there is nothing to prevent the instrument, if not delivered, from being lost or destroyed? A. Nothing.

Q. You don't know whether Captain McAvoy received this or not? A. Indeed I do not.

There is no evidence that Captain McAvoy received this bulletin. There is no evidence that he knew what it contained. There is no evidence that he had the information which it sought to convey, and we believe that the Government has not, by its

evidence, brought home to Captain McAvoy the receipt of this bulletin, nor by sufficient evidence shown that it was addressed or placed in the mails and directed to Captain McAvoy at a point where he would probably receive it, or where it was usual for him to receive his mail.

Second, as to the bulletin itself. This bulletin in no way contradicted the previous bulletin, Exhibit B. Mariners were told in this bulletin that on July 31st, 1900, the work had progressed to a point where there was only sixteen feet of water over the embankment, and warned mariners to give the old breakwater a berth of 300 feet, or avoid it by that distance. Had Captain McAvoy had this circular nearly a year later, on the evening that he arrived at Two Harbors, in 1901, together with the other one, he could not have known that the red light which marked the end of the breakwater was not then marking the end of it as extended. The lighthouse book said it was so marked. He could not know in the darkness whether the breakwater was 750 feet long or not, nor could he tell the angle of its course from the lake side as he was approaching it. The last bulletin said it was to be finished in 1900. Even on the date that the bulletin was issued, the place was not a dangerous one to a vessel drawing less than sixteen feet of water, and there certainly was nothing that the vessel could injure in going across or over the embankment other than herself. The stone embankment could not be injured by the vessel striking it; besides that, she was not drawing water enough to strike it. But whatever may be said about this notice, like the other

one, it was no notice of the condition of the breakwater at the time the collision occurred. In both cases the master was justified in believing that the breakwater had been finished in 1900, as stated in the first circular, and that he was safe in going around the red light which would, in that case, mark the end of the extended breakwater, and in the lighthouse book which he consulted on this voyage to Two Harbors the end of the breakwater was marked by a red light.

He would have then had two bulletins: One issued in 1899, saying the breakwater was to be finished in 1900; another one, dated August 11, 1900, saying the work had progressed so far by July 31, 1900, that the foundation was all in and there was sixteen feet of water over it. None that it had not been completed as stated in Exhibit B. On the way over on July 24, 1901, Captain McAvoy consults his government lighthouse book corrected to May, 1901, and reads that the end of the government breakwater at Two Harbors is marked by a red light. This is just as it used to be. The work had evidently been finished. With this information before him, what could be expected?

The evidence shows that on the way over from Superior to Two Harbors the evening of the collision Captain McAvoy consulted the Government Lighthouse Book (known as Exhibit I, p. 177), corrected to May, 1901 (nine months later than bulletin Exhibit "C"), and learned that the breakwater at Two Harbors was lighted by a fixed red light (Rec., 93 and 94). This book was issued at Washington by the Government and corrected to the opening of

navigation of 1901 (Rec., 177), and Captain McAvoy therefore knew, that he was to meet a fixed red light on the end of the breakwater and had, therefore, no occasion to look for any other or different light or lights.

This lighthouse book is issued by the Lighthouse Department, and was then in the Treasury Department of the Government. This department of the Government had nothing to do with the construction of the breakwater, which was under the War Department, or with sending out notices to mariners, which was done by the Navy Department. All of these departments are strictly independent of each other, and neither reports to the other what it is doing.

As the Shenandoah was approaching Two Harbors on the night of the collision Captain McAvoy had no knowledge of the actual conditions as they existed there. He had not been there since 1898. He did not know that the partially submerged breakwater extended beyond the red light which he saw. He knew of no obstruction of any kind there. It is claimed, however, that had he read the Exhibits B and C he would have known.

Let us suppose, for the sake of argument, that he had received, read and actually had before him, with the lighthouse book which he consulted, these two bulletins; what would he have known? From these (and they were the only notices sent out) he could have known only that the breakwater was to have been completed in 1900, and by Exhibit "C" that the work had on July 31st, 1900, so far progressed that the foundation had been laid and that

in one spot there was sixteen feet of water. Suppose he had had all this information before him on July 24, 1901, with the lighthouse book of April, 1901, telling him of the red light, would he have looked for a hidden obstruction lighted by a white light? Would anyone have done so? Is it reasonable to suppose that he could have imagined that the Government work had not been completed as stated in the bulletin of July 29, 1899? When the bulletin of August 11, 1900, corroborated it, in stating how far the work had progressed at that time, leaving as it did at least five months in the year 1900—in all nearly a year—in which the work could have been completed. Can it be said, in the light of this evidence, that Captain McAvoy was guilty of negligence, or could have been guilty of negligence? A reliance upon such notices as he received, and as the Government now says he must have received, would have lulled him into security, for he could not have looked for an obstructing breakwater which the Government had sent him word would be completed in 1900. He was entering the harbor on the 24th of July, 1901, nearly a year after the last notice to mariners, viz.: (Bulletin, Exhibit "C," dated August 11th, 1900). Why would he look for danger when the work had been completed and the lighthouse book marked the end of the breakwater with a red light? If he relied on the bulletins and the lighthouse book he could safely navigate just where he did. Even though he had had the chart, "Exhibit A," it would not have contradicted what the bulletin said, for it indicated in dotted lines where the new breakwater was, and

even if it had been construed to mean that it was not yet completed, and therefore in contradiction of the bulletins, yet there was at least eighteen feet of water everywhere except on the one spot on the chart which showed a depth of sixteen feet. Even in the face of the chart Exhibit A and the engineer's bulletin (if he had called for these), he was safe in navigating his vessel where he did. If he could have known that, contrary to the bulletin of July 29th, 1899, the breakwater had not been completed in 1900, and contrary to the bulletin of August 11th, 1900, there was not eighteen or sixteen feet of water anywhere where the breakwater was to be built, but that without notice or information to any mariner (not actually on the ground and in sight of the work) the proposed breakwater was actually in place and obstructing the channel, then, no doubt, Captain McAvoy would have been negligent in running into a breakwater which notices to him had said was actually in existence and in place. In other words, had the notice which was given in October after the accident been seen by Captain McAvoy before July 24th, the collision would not have occurred. It is, therefore, perfectly apparent that the notices sent out were not notices of the true condition of the breakwater at the time of the collision, and if they were, they still did not amount to a sufficient notice to put him even upon inquiry, and the Government was therefore guilty of contributory negligence.

How can one escape the conviction that the Government was negligent? All the information sent out did not show the true condition, and was therefore misleading and wrong.

THE ENGINEER'S BULLETIN EXHIBIT "D."

This bulletin, dated April 10, 1901, states as follows:

> "East breakwater is 750 feet long and during next summer will be extended 300 feet in a southwesterly direction, the rip rap embankment being already in place under water, vessels should keep 300 feet away from the outer end of the east breakwater."

This bulletin, it is claimed, could have been had at the Engineer's office *on application.*

It is claimed that it was the duty of Capt. McAvoy to have applied for it. Not having done so, it is said that his ignorance of its contents is no justification, and he must, therefore, be held to have known what it contained, and the defendant bound in law by the information. It is not claimed that this bulletin was even sent out or called to the attention of mariners. We have shown by the preponderating evidence of the ship masters that they had never heard of the publications of such bulletins and had never applied for them for that reason. The information, therefore, did not reach shipmasters, and did not reach Captain McAvoy.

Is a master, as a matter of law, bound to inquire at the Engineer's office at Duluth, Detroit, Buffalo or Chicago for information as to the piers and breakwaters that were being built by the Government, and is his not doing so negligence? We say he was not so bound to inquire, because the Government was issuing bulletins, notices to mariners from time to time *and actually sending them to the mariners,* stating the condition of all obstructions, or proposed obstructions, to navigation. These bulletins

applied to all obstructions or dangers to navigation. These were issued and delivered by the Government. He had a right to rely on them. Why should a mariner, therefore, make inquiries? Must he apply to every department of the Government before he is safe in attempting to navigate the great lakes? If so, how often should this onerous task be placed upon him? Was it fair to assume that the Engineer's department was not working in harmony with the hydrographic office, and was not promptly furnishing the latter with information of the work it was doing that would menace navigation, and that therefore the notices to mariners were not up-to-date or unreliable?

The Government did not notify mariners that supplemental information as to the work of the engineer's department was contained in bulletins issued by it, that could only be had on application at certain ports. Even the hydrographic officer of the Government failed to get the engineer's bulletin. Had he known that there was such information would he not have sought it? He did not get it, and yet he was charged with the duty of getting and sending out the information it contained. He did not send it out. Why should a master look for it—the hydrographer didn't. Why not? Is it not negligence that it was not sent out? Either the Government engineers were negligent in not giving the hydrographic office the information, or else the officer of the latter was negligent in not getting it and sending it out. If not getting it and sending it out is not negligence on the part of either, or both of these departments of the Government, why

should Captain McAvoy's neglect in not calling for this engineer's bulletin be negligence on his part, chargeable against the Steamship Company.

If the Government knew, why didn't it send out the information? The Government must be held and be bound by the conduct or misconduct of the officers of its different departments. What the Government knew through its engineer's department, it was bound to know in its hydrographic department. What the engineers knew, the hydrographer was bound to know, and it therefore resolves itself into this: That the Government knew that it had not sent out a notice to mariners that the breakwater was not finished in 1900 as stated in Exhibits "B" and "C," and that beginning with May and ending early in July, 1901, it had put in place all of the breakwater cribs, and that they completely obstructed navigation, and yet while knowing all this, its hydrographer did not send out a notice to mariners of these facts until after the collision. Which, therefore, was guilty of the greater negligence, the master who did not know of the obstruction because he did not call for the engineer's bulletin, Exhibit "D," or the hydrographer who was bound to know but who did not call for or publish it? If, under these circumstances, Captain McAvoy was guilty of negligence, was not Captain Heinrich, the hydrographer, or Captain Gaillard, the engineer, guilty of greater negligence? If the Government knew what Captain McAvoy did not know, and it did not tell him, then he cannot be held negligent for not asking for what he didn't know and therefore not knowing it. Before the Government can

recover, it must show that Captain McAvoy knew of the breakwater, or that it had given such notice of it that a prudent and skillful navigator would have learned of it in time to have enabled him to avoid it.

The Government has failed to show either actual or constructive notice, because it did not send out notice of the actual condition of the breakwater, although its engineer officer did know, and its hydrographer might have known and was therefore bound to know, its character as an obstruction, and it was the latter's duty to send out the notice to mariners, which he failed to do until after the fatal collision.

In this neglect the Government was so delinquent that it cannot be heard to say that Captain McAvoy neglected to do what the Government had first neglected to do. The Government having undertaken to warn mariners of what it was doing in obstructing navigable channels and waterways, placed mariners in such a position that they had a right to, and did rely on the information, and therefore did not depend upon other sources which they might have used or consulted had not the Government undertaken to give the information through its hydrographic office.

If the bulletins are notice, they must be held to be reliable notice, and must also be held to have been timely, so that they could operate as a warning of danger. They must be considered as truthful, until the contrary appears from a contradicting bulletin. In this case, the hydrographic bulletins did not contradict each other, on the contrary they corroborated each other.

The lighthouse book, the most important publication referred to in this case, must also be held to be reliable if of any value as a publication of the information it contains. Captain McAvoy consulted it as he should. It did not contradict the bulletins. It gave notice of a red light as marking the end of the breakwater. It said nothing about length, dimensions or other qualities of the breakwater. That was unimportant.

Why had not Captain McAvoy a right to rely on it, when the notice to mariners in no way contradicted or was in conflict with what the lighthouse book stated?

A red light was the only one referred to by the lighthouse book as marking the end of the breakwater. A red light was the only light that Captain McAvoy would look for or expect to find there. It was there, he saw it plainly and avoided it and the breakwater it was on.

He did not look for a bright light as marking the breakwater—he had no reason to.

The Government had stated the color of the light there was red and not white.

What excuse does the Government now make for using a white light there?

It is claimed that there is no law or regulation requiring a particular kind or color of light to be used as signals on breakwaters in course of construction. This may be true. It is nevertheless equally true that a dangerous obstruction to navigation, such as a line of rip rap directly across the mouth of a harbor, requires a light of the plainest and most unequivocal character—a light which will plainly indicate that there is danger and which will

not mislead the mariner. We have already shown how entirely misleading it was to maintain a red light on the end of the old breakwater without any effective notice of the breakwater extension and especially after giving notices through the hydrographic office in 1889 and 1890 that the breakwater would be completed in 1900, and notice in 1901 through the lighthouse board that the end of the (thus completed) breakwater was marked by a red light. We submit that no further argument should be required to show the utterly insufficient and misleading character of the white light which the Government actually placed upon the end of its rip rap extension.

Nor is it material that a white light had sometimes been used elsewhere to mark public works of this kind. If such lights are or may be misleading, no amount of improper use can make them a proper warning of a dangerous obstruction across an important harbor. Moreover, whatever their propriety in other localities, the notices sent out and the conditions existing at Two Harbors made them wholly improper here, where it is plain that the white light placed on the end of the breakwater was doubly misleading; first, because it was nullified and made to mean anything but a breakwater light by the Lighthouse Board's notice that the end of the breakwater was marked by a red light, and second, because under such circumstances it not only might but actually must mean to mariners an anchored vessel and not danger.

But there are other reasons why, in the absence of notice sufficient to put a mariner upon his guard,

the light placed on the end of the breakwater extension was misleading and improper. That light was a white light at least 330 feet away from the permanent red light near the end of the old breakwater. It was not on an extended east and west line of it, but was farther out in the bay. It was, moreover, the kind of a light prescribed by law for an entirely different purpose. It was an anchor light. It was in a place where vessels come to anchor, and where they would be required to display an anchor light.

Under the Act of Congress of May 28, 1894, entitled "An Act to Regulate Navigation on the Great Lakes and Their Connecting and Tributary Waters," it is, among other things, provided what lights vessels in motion and at anchor shall carry and display while navigating the Great Lakes and their tributary waters, they shall be as follows:

> "Rule 9. A vessel 150 feet registered length, when at anchor, shall carry forward, where it can best be seen, put at a height of not exceeding 20 feet above the hull, a white light in a lantern constructed so as to show a clear, uniform and unbroken light visible all around the horizon at a distance of at least one mile."

This was the kind of light that vessels at anchor in Agate Bay, or the vicinity, would be displaying. It was the same kind of a light that was being shown by the Government on this breakwater. The light was intended to warn mariners, not landsmen. How would the former understand it? Ought it not to be an unequivocal light, one that could not be misunderstood? It was not such a light. It was mistaken for an anchor light. The testimony shows it was bound to be so understood, for to a mariner

it had but one meaning: An anchor light. Captain McAvoy testifies that on the night of the collision he saw the light, and on page 20 he says:

"Q. I wish you would just tell the court and jury now, as you came within sight of the Bay, how you managed your ship with a view of entering the Bay on that night? A. On the night of the 24th of July?

"Q. Yes. A. Well, now, I kept her away from the harbor and checked down. Coming and checked down I saw this light ahead; I saw this bright light *and supposed it was a schooner there at anchor, or a barge rather.* I saw there was plenty of room between that light and the end of the breakwater for me; so I steered as near as I could about midway between both lights. I supposed I was going in clear until I see the breakwater down under her bows. Then I knew there was something wrong and gave the check to reverse the engines immediately."

Gaskell, the second mate of the Shenandoah, page 106, says:

"Q. What did you suppose the white light was, in your opinion? A. I supposed—*my opinion was that it was a boat at anchor.*

"Q. You mean you thought it was a boat at anchor? A. Yes, sir. That is the sort of a light they always carry.

"Q. Does a boat at anchor carry any other lights? A. No, sir.

"Q. What do you know about vessels coming to anchor there at the point where you say you thought there was a boat at anchor, where you saw the white light? A. I have seen vessels at anchor there. I have seen steamers come in there with a barge and drop it, and immediately they would go up to the pier, leaving the barge there for the tug to take care of.

"Q. Did you ever see them let go their anchor there? A. Yes, sir, I have.

"Q. When they let go their anchors what did they do with their under way lights? A. The first thing they do when they let go their anchor is to have the lights down and put up the anchor lights.

"Q. Does it make any difference how long you are going to stay at anchor? A. No, sir. You are supposed to have them up if you are only going to anchor five minutes."

Captain McAvoy, on page 95, again says:

"Q. Did you have any idea at that time, and if so, what, as to what the bright light marked? A. I thought it was a schooner or something or a barge that had been towed in there and dropped anchor and had dragged her anchor.

"Q. Tell about the custom as to barges going in there to anchor, or being dropped there; tell us about that. How is that done? A. Well, they generally, with a northeast wind blowing, they go around the breakwater when they cast off the tow line from the steamer. Some go ahead as far as they can. If they can't make the dock they let go anchor there. They generally carry their anchor on the rail ready to drop it. Sometimes they can get up to the ore dock, but it is very seldom that they can make the ore dock."

Page 96:

"Q. When a vessel comes to anchor what lights does she show, and when she is under way what lights does she carry? A. What lights does she show?

"Q. Yes, when she is under way what lights does she show? A. A red light and a green light.

"Q. And when they are lying at anchor what lights do they show? A. A bright light. That is, they hang a bright light in the rigging.

"Q. Had you ever known vessels to come to anchor there that way? A. Yes, sir.

"Q. State whether or not you have known times when they have dragged anchor out of the harbor there near the pier? A. I see one while we lay there this time when I had the collision.

"Q. Tell us about that? A. Well, a boat was brought up and the steamer let her go a little inside the breakwater and before the tug got to her she dragged down abreast with the breakwater inside of it probably 400 feet.

"Q. Out in the lake? A. Yes, sir. Outside on the west breakwater.

"Q. These lumber vessels, about what is the size of them. A. There is a great many of these ordinary canal size steamers, from 140 feet, and from that up.

"Q. And how about the barges? A. The barges are some of them less."

All the testimony of the expert ship masters is, that a bright light, such as was displayed here by the Government at that point in the darkness, and without the knowledge that it was marking the end of a breakwater, would be taken by mariners for the light of a vessel at anchor.

Captain Leisk, page 125, says, speaking of a white light:

"Q. What would an average mariner assume that it was? A. A white light indicates a signal on some floating object *such as an anchored vessel*, or it might be a small yacht, for instance. We meet all of these things coming into the harbor. Naphtha launches, boats traversing back and forth.

"Q. If you saw this light and took it to be 20 feet above the water, what would you take it to be? A. The Government for vessels at anchor specifies that we shall carry a bright light not to exceed 20 feet above the vessel's deck,

naturally a light 14 to 20 feet high would be considered a vessel at anchor."

Captain Chilson, who was asked the question, testified on page 131:

"Q. Assuming further, Captain, that the white light you saw was anywhere from 14 to 20 feet above the water? A. You might take it for different things. A man coming in from the lake might take it for a light on the shore, *or take it for a boat at anchor.*"

Captain Lyons testified, on page 135:

"Q. What is a single light used for if it is stationary; what is that commonly understood to mean to the average mariner in the water? A. Generally means it is a floating object or lying at anchor."

Captain Frank testified, on page 141, speaking of the light:

"I should judge it was, I should think *it must be a vessel at anchor,* or some boat out from the harbor."

Captain Allen, page 149, testified:

"Q. Supposing you are entering the harbor of Two Harbors at night; it was a dark night and you saw a red light, and if, in your book, you found that a red light marked the end of the breakwater, and suppose some 300 to 500 feet away from you that you saw a single white light, what would these lights indicate to you in approaching the harbor at that time? A. *Something lying there at anchor,* or a floating object."

Captain Girard testified, page 159, when asked practically the same question that was asked the last witness:

"A. *I should consider it to be a vessel lying at anchor,* and that I should be justified in taking the other side of it and going into the harbor."

Captain Gaillard, the Government engineer, page 61, admits that he did not know what kind of a light a vessel at anchor displayed.

It is not strange that collisions occur when the Government officers do not even know the lights required by law. How could they use the proper light when they did not know the meaning of lights? Here the Government official was obstructing navigation, interposing an artificial reef across the path of every vessel that entered this port without giving any notice to anyone, and then using a light the meaning of which, to a mariner, he didn't know. Is it to be wondered that a mistake was made by the Government?

From this evidence, therefore, it must be perfectly apparent that the white light was a misleading light, and the Government officers ought to have known it, and therefore it ought not to have been used.

A misleading light is as bad as no light at all. In numerous collision cases this question has been considered and we find upon this the following decisions:

Displaying Wrong Light.

The Excelsior, 39 Fed. R., 393, was a case where a steamer was proceeding down New York harbor at night. The master observed a white light ahead, but no colored lights. Thinking it to be a vessel going in the same direction, he changed his course sufficiently to give the white light a wide berth, but

instead of its being a steamer going out, it proved to be a sailing vessel passing up the harbor, but with only one light displayed, and that a white light contrary to the statute. *Held,* that the sailing vessel was wholly at fault.

Connolly v. *The Brandywine Granite Co.,* 108 Fed. R., 99, was a case where a dredge was anchored in the Delaware River, without displaying the lights required by law for vessels at anchor. An up-bound vessel in tow of a tug collided with the dredge. The court says:

> "The lanterns of the dredge did not obey this rule. The place where they hung was not where they could best be seen and neither light could have been visible even in clear weather at the distance of a mile. Whether, if the light had been properly placed, it could have been seen in time by the tug in spite of the fog, it is impossible to decide. But the dredge should have obeyed the regulation and then if her light had been so obscured by the fog as not to be visible, she would not have been to blame. *As matters stand, while one cannot be sure upon this point, I think the dredge ought to have shown clearly that her fault in this respect had no effect in producing the collision.*"

The Sciota, 81 U. S., 170, was a case where a vessel was held at fault for carrying a white light on deck instead of at its masthead.

The Conoho, 24 Fed. R., 758, was a case decided in 1885 by the District Court for East Virginia. The statute requires a range light to be carried by steamers. The vessel in question carried only a masthead light, which gave it the appearance of a vessel at anchor. The court says the strict observance of these rules of navigation is necessary to

the safety of navigation. An approaching vessel which sees only a white light on the other vessel and regulates her movements on the assumption that such vessel is at anchor, is not in fault in case of collision, but the other vessel is solely liable.

Foster v. *Merchants & Miners Trans. Co.*, 134 Fed. Rep., 964. In this case a tug had her two white towing lights placed 3 feet apart instead of vertically one directly over the other and she was held at fault for the collision.

The Frank Moffat, Fed. Cases, No. 5060, decided by Judge Brown, E. D., Mich., in 1878, was a case where a propeller was aground on the St. Clair Flats. A tow, up-bound, collided with it. The propeller was condemned for not exhibiting the light required by law. The courts says:

> "A fault proven to have been committed is presumed to have contributed to the collision, and the want of a proper light has always been considered a fault of the grossest description."

Casement v. *Brown*, 148 U. S., 615, was a case somewhat similar to the one at bar. Casement & Co. were constructing the piers of a R. R. bridge over the Ohio River near Cincinnati. One of the bridge piers was submerged by the high water then prevailing. This submerged pier had been designated by lights at night and buoys by day. The high water carried away the buoys designating the submerged pier. A steamer with a tow was descending the river in the day time and ran on and injured this submerged pier. An action was brought by the contractor for damages caused by the barge. The absence of the buoy was not known

to the steamboat men. The absence of the buoy was known to the contractors early that morning. They made no effort to replace it, nor did they send any one up the river, as they might have done, to notify descending vessels. The trial court held:

> "That it was the duty of the contractors to keep a buoy upon the submerged pier, and if it was washed off, to replace it, or if this could not be done, they should have sent some one up stream a sufficient distance to notify approaching vessels, or adopt some plan to notify vessels of the changed conditions. That failure so to do was such negligence as would prevent recovery."

This holding was affirmed by the Supreme Court. The Supreme Court, in deciding the case, says:

> "The steamboat men knew that here was a great work being constructed by defendants; that it was their duty to give all needful warning to persons and boats going up and down the river, and that there were no buoys in place, or other warnings given, they might fairly conclude that all of these piers were so far submerged as to threaten no danger to passing boats. Shall the vessel men be condemned because they relied upon the contractors' faithful discharge of their duty of giving suitable warning and, in the absence of such warning, believed there was no danger?
>
> "The judgment is affirmed."

In this last case the contractor was held liable although the master of the steamer knew that the work was going on. In the present case the master did not know of the construction, and had a light been used which would indicate danger and not a vessel at anchor, this collision would not have oc-

curred and the damage would not have been done.

The Government officers ought to have known the meaning of vessels' lights. These lights speak to the mariner as if they were words. They stand for and mean certain things. The testimony shows that the Government officers did not know what the meaning of such a light was, and therefore misled the mariner. The Government must be held answerable for this and the damage which was occasioned through it.

THE GOVERNMENT SHOULD HAVE USED A RED LIGHT TO MARK THE END OF THE NEW CONSTRUCTION.

That a white light exhibited at the end of this submerged breakwater was a misleading light is clearly shown by the evidence. It is equally clear that had a red light been used it would not mislead a mariner. A red light at sea or at the point where this white light was exhibited, on a dark night, like the night of the collision, would be examined by a mariner to determine whether it was a stationary or a moving light. It was too dark to determine what it was on or how it was displayed, and in this darkness no one could tell whether it was on a ship or afloat, or on a pier or breakwater, and therefore stationary. The light must be taken merely as a signal independent of what it was on. It appears from the evidence that a red light in a lake, bay or river, when it is not known to be placed upon a stationary object, is displayed only as the port light of a moving steamer or vessel.

The Act of Congress, giving the Rules of the Road at Sea as to the lights to be carried by steamers

and vessels in motion, paragraph C of Rule 3, provides:

> "C. On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles."
>
> "D. Said green and red lights shall be fitted with inboard screens projecting at least three feet forward from the light so as to prevent these lights from being seen across the bow."

Rule 6 provides:

> "A sailing vessel under way and any vessel being towed, shall carry the side lights mentioned in Rule 3."

It is the law, and mariners all know it, that a red light is a side light, and that as such it is only displayed on a moving vessel, and cannot be seen from astern or behind, as the screen in which it stands prevents its being seen from any point except dead ahead for an arc of the circle of 110 degrees, this being ten points abaft the beam, or just beyond a right angle from dead-ahead, or to speak accurately, 22 degrees beyond a right angle, which is 92 degrees of a circle.

The red light, as provided by law, when carried on a vessel, is only displayed on a moving vessel. Never on a stationary one. As Capt. McAvoy approached Agate Bay, had the Government displayed a red light instead of a small white light, he could have easily determined whether the red light was moving or fixed. If it had been moving it would then conclusively indicate that it was on a moving

vessel, and if stationary the character of it would be equally conclusive, as every mariner would then know it to be a danger signal. As a stationary light it would have no other significance to a mariner because it could be used but for one other purpose, and that was on a moving vessel. Being stationary, it would therefore be an extraordinary light, and one that would indicate danger when displayed in a bay or place in the proximity of a harbor where one might look for a stationary light of this kind.

Even on shore a red light is considered a signal of danger. It is a matter of common knowledge that such lights are used to mark obstructions and excavations in the highway. This is well known. It has the same significance at sea. This is the testimony from the expert ship masters on this subject.

Capt. Chilson, page 132:

"Q. Captain, what to a mariner does a single white light indicate out in the water of a bay? A. It would indicate different things. *It would indicate a vessel at anchor or a small boat.*

"Q. I mean a red light? A. That would mean there *was an obstruction there of some kind.*

"Q. Does a single red light have any other significance among mariners than that of a danger signal? A. If you are in a harbor or ascending a stream a red light would be on the starboard—in ascending a stream or entering a harbor.

"Q. What you mean by that is if you saw a red light in a stream or harbor you would pass to the left of it? A. Yes, sir.

"Q. And leave it on your right? A. Yes, sir.

"Q. If you saw it out in a bay, or where you were not in a stream, what would a mariner take it to indicate? A. *It would be a danger signal.*"

Captain Lyons, page 136:

"Q. What does a single red light, stationary in a roadstead, bay or lake, mean to a mariner? A. In a roadstead, lake or bay?

"Q. Yes. A. I could make two answers to that, sir. In the lake if I would see a red light low to the water I would suspect it to be a schooner under sail.

"Q. If the light was stationary, I mean? A. If it was stationary *I certainly would take it to be a danger signal.*"

On cross examination, on page 137, this witness says:

"Q. Assuming that you saw a red light—fixed red light—at the westerly end of the east breakwater, and you supposed that was the end of the breakwater, and out further, say a distance of 500 feet, you saw a red light, now, that red light would not in any way prevent you rounding the breakwater in the ordinary way and going into the harbor, would it? A. Yes, sir, it would. Because I would not take it for granted that this first red light was the end of the breakwater. If I picked up my Lighthouse book and saw that the new breakwater was marked by a red light, a fixed red light, just as soon as I saw that I would go around the two. I would try to get around the last red light, if possible—that is, if I thought it was on the west end of the east breakwater."

Captain Frank, page 140:

"Q. Having a white light at the entrance to Agate Bay, what would it indicate to a mariner? A. It would indicate a vessel at anchor.

"Q. Seeing a single red light, without an accompanying light, stationary, what would that indicate? A. At that point?

"Q. Yes. A. Well, it is the end of the pier. It was always our mark to keep clear of that light."

Page 141:

"Q. How would you enter with reference to the red light if the light, as the book indicated on the end of the pier, was marked with a red light? A. I should naturally suppose it was that light.

"Q. In what way would you come in? A. I would expect to clear it as usual.

"Q. In what way would you clear the red light? A. We used to go in with our vessel within 40 or 50 feet of it."

On page 143:

"Q. You never saw cribs there (meaning Agate Bay)? A. No, sir, only those they were sinking; *I suppose the red light was always at the end of these cribs.*"

Captain Girard, page 160:

"Q. What kind of lights are used on the lakes to notify mariners of dangerous obstructions in the way of navigation? A. *Red lights, universally so.*"

In addition to this evidence it clearly appears from the evidence of a number of witnesses, including the nautical expert, Heinrich, that the Government had used red lights at different points to mark breakwaters and piers in the course of construction. The Government contends that a white light was the only kind used for this purpose, but the evidence of those who saw red lights on breakwaters is better

evidence than the evidence of the Governmnent engineers, who can testify only to the lights used on the Government work in Lake Superior.

Captain Gaillard's testimony shows that he came to Lake Superior from the seacoast, and therefore was not familiar with the lights and signals used on the Great Lakes.

The best reason, however, for using a white light instead of a red light is that Capt. Gaillard was not familiar with the law in relation to lights carried by vessels, or of the fact that different lights were used on vessels in motion and vessels at rest. He testifies on page 61:

> "Q. Captain, were you, in 1901, familiar with the laws of the United States which provided for the kind of lights that vessels should exhibit at night while under way and at anchor? A. I was familiar with those they should exhibit while under way, but I can't say that I was thoroughly familiar with those they should display while at anchor.
>
> "Q. Did you use that white light there on that breakwater because it was a light that a vessel at anchor usually displays? A. Because the chief engineer approved the specifications which called for a bright light, and I could not have changed that light if I had wished to.
>
> "Q. Do you know whether or not the Government, or any of its officers, had in mind that that light resembled a light that was carried by vessels at anchor? A. I don't know."

It is therefore not strange, when the Government officers are not familiar with the law which provides for the lights that vessels shall carry when in motion and at anchor, that they should use a white light, or any other kind of light that would best suit

their convenience, without regard to how it might be considered or mistaken by a mariner? It is a remarkable admission for an engineer construct harbor work to make.

It conclusively appears in evidence that Capt. McAvoy, while on his way from Superior to Two Harbors on the night of the collision, consulted the Lighthouse book issued by the United States Government, and which was offered in evidence, marked Exhibit 1. He testifies, on page 93, after stating that he examined the book:

> "Q. Look at that book. Is that a book like the one you used? A. Yes, sir.
>
> "Q. Will you turn to the page and give the page on which you had the information relating to the Two Harbors lights? A. Page 82.
>
> "Q. What is it that you found there? A. I found that Two Harbors had a red light on the breakwater. Two Harbors is a fixed white light.
>
> "Q. Is there anything in that book indicating any other lights than a white light on the shore and a red light on the breakwater? A. No, sir.
>
> "Q. Did you or did you not have that information that night before you went there? A. Yes, sir, I did."

The particular entry in the Lighthouse book is found on page 166, and it states:

> "On the outer end of the breakwater at the easterly side of the entrance to Two Harbors, northwesterly shore of the westerly end of Lake Superior, Minnesota. Characteristic of light: fixed red. Kind of light: lens lantern. Height of light above the lake level in feet: 30 feet."

It is in evidence that all shipmasters consulted the Lighthouse book for the purpose of ascertaining the character and color of the light which marks the entrance to a port or harbor. Every expert master so testified. This Lighthouse book is published by the Lighthouse Board of the United States Government, and should give correctly the color and character and other description of the lights which are displayed at the different points, harbors and piers. In this case the light given was a fixed red light. This undoubtedly meant the red light which was a fixed light such as had been used on the old breakwater. The Lighthouse book, therefore, was misleading in that it did not state that there was an additional white light at the end of the new extension of the breakwater. It was specially misleading because the light placed there as a temporary light, was a white light. Had it been a red light the mariner might have considered, just as some of the expert masters have testified, that the red light, the outer one, was the one which marked the end of the breakwater. It could be taken for nothing else unless it might have been taken as a danger signal marking a wreck or some other obstruction like a crib, pier or breakwater, and in any of these cases it would have been avoided by every mariner, because it would have indicated either the end of the breakwater, which he must round to enter the harbor, or else a dangerous obstruction which a mariner would approach with caution, and in this way could, upon approaching it, learn that it marked a breakwater over which the heavy sea was breaking, and it then could have been avoided without difficulty. As it was, Capt. McAvoy was misled, just as any

mariner would have been, and, taking the white light as one displayed by a vessel at anchor, he passed a safe distance from it and keeping a safe distance from the fixed red light, proceeded with caution until he was too close to avoid colliding with the breakwater.

In the case of *Hornson* v. *Hughes,* 110 Fed. Rep., 545, a vessel collided with a submerged breakwater which was being built near the mouth of Delaware Bay. The breakwater extension had been lighted by a temporary light, which was placed on the extension, but which had been blown out at the time of the collision. The court held that those in charge of the construction of the breakwater were at fault for their failure to keep the light burning. *That it was the duty of those building the breakwater to maintain such lights as might be necessary to give proper warning to vessels, even if it necessitated the use of other or different lights provided for in their contract with the Government.* It was held, therefore, that no recovery could be had.

The case of *United States* v. *Charles G. Dunn Co.,* 124 Fed. Rep., 705. This was an action brought by the United States for damage to a Government pier in the Delaware river. The pier was 50 feet wide by 250 feet long, its outer end being protected from the ice by an ice break 75 feet long. The pier was lighted at night by an ordinary white anchor light. A steamship coming up the river at night in charge of a duly licensed pilot, collided with the pier, doing damage amounting to about $8,000 to the pier. *The court held that the pier was insufficiently lighted and no recovery could be had. After the colli-*

sion the outer and inner ends of the pier were lighted by red lights. It was held the Government could not recover.

These cases bear out what we contend for. In the first case the Government and contractor could not justify the use of a particular light because the contract so provided.

In the last case, like in the case at bar, a white light was condemned as insufficient, and two red lights used in its stead.

The Government having by its latest official publication, the Lighthouse Book, notified mariners that the outer end of the breakwater in question was marked by a red light, should not have substituted a different light to mark the outer end, *without first having given notice of such change,* through the usual channel of giving such information. There is no dispute on the question as to whether any notice of such change was given by the Government. It is admitted that no such notice was given prior to the accident. It is in evidence that vessel masters rely on the correctness of these Lighthouse books. Captain McAvoy had a right to rely on this book, issued by the Government to him.

Our position is that the Government has failed to bring home to Captain McAvoy any knowledge or to charge him with any notice whatever either actual or constructive of the existence of breakwater extension at Two Harbors; that he was consequently justified in entering the harbor with the lighthouse book corrected up to within three months as his guide, and in regarding a white light out in the fairway as the anchor light of a vessel.

If, however, the court should take the view that Captain McAvoy was bound to take notice of the bulletins of the hydrographic office (Exhibits "B" and "C") because somebody mailed them to the Detroit marine post office and of the chart of Agate Bay (Exhibit "A"), because that is an ordinary aid to navigation, then we ask the court to take these exhibits and construe them together just as Captain McAvoy was entitled to construe them if he had had them all with him that night. We submit that read together, they can only mean one thing, *i. e.*, that the breakwater extension was finished in 1900 as projected, and that the end of the completed breakwater is now marked by a fixed red light. Upon the Government's own contention, therefore, the captain was justified in regarding the white light as anything rather than a breakwater or a danger light.

To sum up we submit that the evidence acquits the defendant of negligence and conversely convicts the Government of contributory negligence, for the following reasons:

First. The bulletin of July 29, 1899, Exhibit "B," was notice that a breakwater would be built and finished in 1900.

Second. The bulletin of August 11, 1900, Exhibit "C," was a notice of the progress of the work and nothing to indicate that the work would not be completed in 1900, as set forth in Exhibit "B."

Third. The lighthouse book stated and construed in connection with previous notices meant that a red light marked the end of the east breakwater completed.

Fourth. The Government did not send out a bulletin showing the actual condition until after the collision, but left mariners to suppose the work completed.

Fifth. No contrary information could be found in the chart, Exhibit "A," or in the engineer's bulletin, Exhibit "D," and, moreover, these exhibits were not sent to mariners through the usual channels by which the Government sent out such information, but had to be hunted up and called for.

There was no evidence whatever that Captain McAvoy knew the actual condition of the breakwater at the time of the collision, and no evidence that he had received any notice whatever of the actual conditions there. There was no evidence that such notice as he was supposed to have received was competent to put him on inquiry in 1901, when the bulletins stated the work was to be completed in 1900. There was no evidence that the Government had informed mariners where they could obtain further information.

There was, therefore, no competent evidence whatever against the defendant. The Government, on the contrary, was affirmatively guilty of negligence as follows:

First. In failing to send out a bulletin of the actual conditions.

Second. In stating in the lighthouse book that a red light marked the end of the breakwater, which, according to its notice, was to have been completed the previous year.

Third. In displaying on the end of its rip rap,

300 feet beyond the red light referred to in its lighthouse book, the anchor light of a vessel instead of a recognized signal of danger.

There was, therefore, no negligence proven against the defendant by competent evidence, and the evidence clearly shows such contributory negligence on the part of the Government as would prevent a recovery in this case.

The judgment of the Circuit Court should, therefore, be reversed.

CHARLES E. KREMER,
HERMON A. KELLEY,
Attorneys for Plaintiff in Error.

August, 1906.

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No. 220.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

DAVIDSON STEAMSHIP COMPANY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

DAVIDSON STEAMSHIP COMPANY, PLAINTIFF in error, *v.* THE UNITED STATES. } No. 220.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

This suit was brought by the Government in the United States Circuit Court for the District of Minnesota to recover damages to an extension of the easterly breakwater at the entrance to Two Harbors at Agate Bay on Lake Superior, resulting from a collision with said breakwater by the steamer *Shenandoah*, owned by the plaintiff in error. The case was tried to a jury and a verdict returned in favor of the Government for the full amount of the damages sustained, viz, $4,012.50. The steamship company thereupon took the case to the Circuit Court of Appeals for the Eighth Circuit, and on the 7th of November, 1905, that

court affirmed the judgment of the court below. The case is before this court on a writ of error to the Circuit Court of Appeals for the Eighth Circuit.

THE QUESTIONS PRESENTED.

The record contains thirty-six assignments of error, many of which need not be considered for the reason that counsel for the plaintiff in error rely upon and discuss but two propositions in their brief, which are as follows:

1. That the master of the *Shenandoah* was not guilty of negligence in failing and neglecting to ascertain the conditions at the entrance of the harbor of Agate Bay before attempting to enter it on the night of the 24th of July, 1901.

2. That even if the master of the *Shenandoah* was guilty of negligence in failing and neglecting to inform himself as to the existence of the improvement, the Government through its officers and agents was guilty of contributory negligence in failing to maintain a red light on the new extension to the old breakwater, which was then under process of construction.

Inasmuch as counsel for the plaintiff in error have elected to rely upon these two questions for a reversal of this judgment, we shall confine our discussion to these two propositions.

I.

The Negligence of the Master of the Shenandoah.

The testimony upon the trial of this case shows very clearly that the master of the *Shenandoah* had failed and neglected to inform himself as to the conditions then existing at the entrance to Two Harbors, Minn., which an ordinarily prudent and cautious mariner would have done under similar circumstances. The Government issued notices and bulletins concerning the extension to the breakwater at Two Harbors, and prepared and issued a chart which showed the precise location of the new breakwater. These notices, bulletins, and chart will now be taken up and considered in the order in which they were issued.

On July 29, 1899, a pamphlet was issued by the Hydrographic Office of the Navy Department, entitled "Notice to Mariners, published weekly by the Hydrographic Office," No. 30, Washington, D. C. This pamphlet was marked "Plaintiff's Exhibit B," and the portion of said exhibit particularly referred to and offered in evidence is as follows:

> (703) Lake Superior — Minnesota — Two Harbors — Information concerning breakwater — Depth alongside docks — The following information concerning the Government breakwaters at Two Harbors was obtained from Mr. J. H. Darling, U. S. assistant engineer:
>
> The breakwater at the west side of the

harbor is built to the length of 750 feet, 150 feet to be added and finished in the year 1900.

The breakwater at the east side of the harbor is built to the length of 750 feet; the proposed extension of 250 feet in the same direction has been abandoned and in its stead an extension at an angle of 45 degrees southward 300 feet in length is proposed, making the entire length of this (eastern) breakwater 1,050 feet. This is also to be finished in the year 1900.

Information has been received from Mr. R. Angst, chief engineer of the Duluth and Iron Range Railway, that the least water on both sides of all the ore docks in Agate Bay, Two Harbors, is 20 feet, 18 feet on both sides of the merchandise dock, and the same depth on the southwest side of the coal dock. (Rec., p. 175.)

On August 11, 1900, the Hydrographic Office of the Navy Department issued an octavo pamphlet entitled "Notice to Mariners, published weekly by the Hydrographic Office, No. 32, Washington, D. C., August 11, 1900," marked "Plaintiff's Exhibit C."

The portion of this exhibit particularly referred to and offered in evidence is as follows:

Lake Superior—Minnesota—Two Harbors breakwater—Caution. Referring to Notice to Mariners No. 30 (703), of 1899, further information has been received that the work

on the extension of the breakwater piers at Two Harbors has been actively carried on by the Government since the opening of navigation.

A communication from the contractor, dated July 31, 1900, states that the submarine work on the extension of the east breakwater has now advanced so far as to leave only 16 feet of water over the embankment. Such a spot is located about 200 feet from the end of the old breakwater.

Masters of vessels are therefore cautioned on entering the harbor to give the old breakwater a berth of 300 feet and not to round the east breakwater close on board, as formerly, on account of this danger.

(Rec., p. 176.)

Frank Heinrich, a Government witness, and a nautical expert for the Navy Department, in charge of the United States hydrographic office in Duluth, who was called as a witness in behalf of the Government, testified that the above bulletin was promptly mailed to masters of steamships and sailing vessels in the Duluth district, and that a copy had been mailed to Captain McAvoy, of the steamship *Shenandoah*, at Detroit, Mich., care of the marine post-office. (Rec., p. 43.)

Maj. Walter L. Fisk, a witness for the Government, testified (Rec., p. 73) that on March 6, 1901, the War Department prepared and issued a chart of Agate and Burlington bays (see Government's Exhibit A, record, p. 183), which designated the

old pier on the east side of Two Harbors with a fixed red light at the west end of the pier, and indicated the extension by dotted lines extending southwesterly at an angle of 45 degrees; that charts of this character are published by authority of an act of Congress as aids to navigation; that the chart in question had been placed on sale at the headquarters of the lake survey at Detroit, and also on sale at the office of the canal at Sault Ste. Marie, Buffalo, Duluth, Chicago, Milwaukee, Cleveland, and Oswego, where it could be had for the price of 5 cents.

On April 1, 1901, a bulletin (Government's Exhibit D, record, pp. 91, 177) was issued by the Chief of Engineers of the United States Army at Washington, which bulletin was intended to supplement the information given upon the charts of the Great Lakes, and also stated where said bulletin could be had upon application. On page 5 of this bulletin appears the following:

> Agate Bay, Minnesota (Two Harbors). Before improvement, fully exposed to the winds from southeast and to heavy swells from northeast and southwest winds. January, 1901.—The west breakwater has been completed and is 900 feet long. East breakwater is 750 feet long, and during next summer will be extended 300 feet in a southwesterly direction, the riprap embankment being already in place under water. *Vessels should keep 300 feet away from the outer end of the east breakwater.* Vessels can remain

in harbor during severe storms. Charts: Lake Superior, No. 3; Lake Superior; Agate and Burlington bays.

This bulletin was obtainable upon application from the following United States engineers' offices: Duluth, Minn., 519 Providence Building; Milwaukee, Wis., custom-house; Chicago, Ill., 1637 Indiana avenue; Grand Rapids, Mich., 57 Park street; Detroit, Mich., Canpau Building; Cleveland, Ohio, Hickox Building, 185 Euclid avenue; Buffalo, N. Y., 540 Federal Building; Oswego, N. Y.. Second National Bank Building.

Captain McAvoy, of the *Shenandoah*, on cross-examination by the Government (Rec., p. 99), testified that all mail addressed to him was delivered to him personally when brought to the vessel; that he had received bulletins and notices to mariners, but disclaimed any knowledge of having received any notices concerning the extension to the breakwater at Two Harbors. He further stated in his testimony on cross-examination (Rec., p. 103) that he paid little attention to notices of this character.

His testimony on this point is as follows:

Q. As a sailor, what do you depend on for information concerning the changes in harbors?

A. Do you say concerning a change in the harbor?

Q. Yes; what information do you depend on?

A. Well, I most generally depend on observation and what I hear from others—other masters that have been in the harbor ahead of me.

Q. You pay no attention whatever to the bulletins when they come in?

A. *Very little.*

Q. Very little?

A. Yes, sir.

Q. And you don't always get information from the masters of other vessels, as was the case in your entering the harbor of Two Harbors that night?

A. Oh, yes, sir; I have often got *information at different places.*

It will be observed from these notices and bulletins that the Government had taken the precaution to advise mariners that an extension to the breakwater on the east side of Two Harbors was under process of construction, and that they should give the old breakwater a berth of 300 feet.

Nitroglycerine Case, 15 Wall., 524, 536.

In this case one Parrot brought an action in the Circuit Court for the District of California against certain defendants who composed the firm of Wells, Fargo & Co., express carriers, to recover damages for injuries to certain buildings owned by him in the city of San Francisco, caused by the explosion of nitroglycerine in charge of the express company. Mr. Justice Field, in delivering the opinion of the court, said:

"Negligence" has been defined to be "the omission to do something which a reasonable

> man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon *any one who takes the usual precautions against accident, which careful and prudent men are accustomed to take under similar circumstances.*

Railroad Company v. Jones, 95 U. S., 439, 441.

This was an action by one Jones against the Baltimore and Potomac Railroad Company to recover damages for an injury received on the road of the company. Judgment was rendered in his favor and the company brought the case to this court.

Mr. Justice Swayne, in delivering the opinion, gave the following definition of negligence:

> "Negligence" is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may

lie in omission or commission. The duty is dictated in a measure by the exigencies of the occasion.

***Grand Trunk Railway Company* v. *Ives*, 144 U. S., 408, 417.**

This case was an action by one Ives, as administrator of an estate, against the Grand Trunk Railway Company of Canada, a Canadian corporation operating a line of railroad in Michigan, to recover damages for the alleged wrongful and negligent killing of the plaintiff's intestate by the railway company at a street crossing in the city of Detroit. It was commenced in the State court, and was afterwards removed into the Federal court on the ground of diverse citizenship. The court said:

> There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and can not be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings

of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court. (*Railroad Co.* v. *Pollard*, 22 Wall., 341; *Delaware, &c., Railroad* v. *Converse*, 139 U. S., 469; *Thompson* v. *Flint, &c., Railway*, 57 Michigan, 300; *Lake Shore, &c., Railway* v. *Miller*, 25 Michigan, 274; *Railway* v. *Van Steinberg*, 17 Michigan, 99, 122; *Gaynor* v. *Old Colony & Newport Railway*, 100 Mass., 208, 212; *Marietta, &c., Railroad Co.* v. *Picksley*, 24 Ohio St., 654; *Pennsylvania Railroad* v. *Ogier*, 35 Pa. St., 60; *Robinson* v. *Cone*, 22 Vermont, 213; *Jamison* v. *San Jose, &c., Railroad*, 55 California, 593; Redfield on Railways (5th ed.), sec. 133, ¶ 2; 16 Am. and Eng. Enc. Law, Tit. "Negligence," 402.)

This court has also held that when a steamer is about to enter a harbor great caution is required. In the case of *Culbertson* v. *Shaw et al.* (18 Howard, 584, 587), Mr. Justice McLean, in delivering the opinion of the court, said:

When a steamer is about to enter a harbor great caution is required. There being no

> usage as to an open way, the vigilance is thrown upon the entering vessel. Ordinary care, under such circumstances, will not excuse a steamer for a wrong done.

Can it be said that Captain McAvoy took those precautions against accident which a careful and prudent mariner would have taken under similar circumstances? Before leaving the port of Superior on the afternoon of the 24th of July, 1901, Captain McAvoy knew (for how long does not appear) that he must call at the port of Two Harbors to pick up the schooner *Paisley* for the purpose of towing her down the lake to Erie, Pa. At that time Captain McAvoy knew that he had not visited the port of Two Harbors for more than a year. He also knew that the Government was engaged in making improvements at various ports on the Great Lakes, and he knew or ought to have known that it was only possible for a mariner to become acquainted with the character and location of such improvements by personally visiting the ports where such improvements were being made, or by inspecting the latest charts and bulletins issued by the United States Government for the information of mariners, or through inquiry and report from mariners and other persons who had recently visited such ports. The improvement into which Captain McAvoy ran his ship, the *Shenandoah*, on the night of the 24th of July, 1901, was first called to the attention of mariners on July 29, 1899 (Government's Exhibit B), and

again on August 11, 1900 (Government's Exhibit C), by which last-named notice masters of vessels were cautioned on entering the harbor of Agate Bay to give the old breakwater a berth of 300 feet and not to round the east breakwater close on board as formerly on account of this danger. Again, on the 1st day of April, 1901, another bulletin was issued (Government's Exhibit D), warning vessels to keep 300 feet away from the outer end of the east breakwater. These notices had been mailed to Captain McAvoy at Detroit, but little, if any, attention was paid to them, according to Captain McAvoy's own testimony; that is, he paid very little attention to any of the bulletins which were sent to him giving information as to the location, character, and extent of Government improvements on the Great Lakes. In addition to this information a chart was published by the Government and issued on the 6th day of March, 1901 (Government's Exhibit A), showing the extent and character of this improvement to the east breakwater at Agate Bay.

Notwithstanding all this information which had been issued and published by the Government for the protection of mariners, Captain McAvoy left Superior Harbor on the afternoon of the 24th day of July, 1901, with the purpose of visiting the port of Two Harbors, where he knew that he would arrive late at night, without having taken the trouble to obtain a chart of Two Harbors, which had been issued at the opening of navigation on that

year, and without having, as he testified, paid any attention to the bulletins which had been issued, published, and mailed to him during the two preceding years for his information and protection. Nor does it appear that Captain McAvoy took the trouble to inquire from other mariners or persons who had visited the port of Two Harbors during that season as to whether any changes had taken place at that port since he had been there more than a year before. In other words, all the sources of information from which Captain McAvoy could have possibly derived any knowledge with respect to the conditions and obstructions, if any, at the entrance of Agate Bay, had been totally disregarded and he approached that harbor on a wild and boisterous night with a high sea running and attempted to enter the bay upon the assumption that no changes whatever had taken place and that the conditions were the same as when he last entered the harbor more than a year before.

This court has said that the master of a steamer is required to exercise great caution upon entering a harbor. Not only is this necessary, but we know, as a matter of common knowledge, that a prudent mariner will not attempt to enter a port in the night-time unless he is perfectly familiar, from comparatively recent inspection, of all the conditions and improvements at the entrance of such harbor. Captain McAvoy had practically closed his eyes to all information concerning this improvement at the entrance to Agate Bay. It is

true that he had had no occasion to call at this port for more than a year, but when the necessity for visiting this port arose, and that too in the night-time, he should have at least attempted to inform himself as to whether conditions at the entrance to the harbor had been changed. Captain McAvoy knew that harbor improvements on the Great Lakes were conducted under the supervision of the War Department, and he could easily have ascertained the conditions at the mouth of this harbor by telephoning the office of the engineers of the United States Army at Duluth. Furthermore, when Captain McAvoy received orders to call at Agate Bay, knowing that he had not been in that harbor for more than a year and that the chart which he had of Agate Bay was an old chart, and that he would be compelled to enter the harbor in the night-time, it was certainly his duty, as a prudent mariner, to obtain a chart of that bay which had been issued by the Government at the opening of navigation, or to make some inquiry at the office of the United States engineers or from other mariners as to present conditions at the entrance of that harbor. Had Captain McAvoy taken such precautions this accident unquestionably would have been avoided.

In order that the question as to whether Captain McAvoy was negligent may be brought home to us in a most forcible manner, let us suppose that on the night in question we had been passengers on board the *Shenandoah* on a voyage from Superior, in the State of Wisconsin, to Erie, Pa., and

that Captain McAvoy had attempted to enter Agate Bay with no more knowledge as to the then existing conditions at the mouth of that harbor than is disclosed by this record; that instead of simply damaging the breakwater in the manner complained of, the *Shenandoah* had gone down, though providentially all the passengers had been saved, would anyone of us have entertained the least possible doubt in his own mind as to the culpable negligence of Captain McAvoy? The mind is instinctively shocked by the mere thought or suggestion that a mariner having in his keeping the lives and property of other persons has performed his full and complete duty toward such persons and property when it is shown beyond question that such mariner has attempted to guide his ship in the dead of night into a harbor with which he is not familiar, and without having before him as an aid to navigation the most recent chart showing the location of obstructions at the mouth of such harbor. The negligence of Captain McAvoy, which was the primary and proximate cause of this injury, consisted in his failure to inform himself with respect to those matters which it was his duty as a navigator to know, viz, that the Government was and for a long time had been engaged in building an extension of 300 feet to the east breakwater at Agate Bay. If on the night of the 24th of July, 1901, Captain McAvoy had known this simple but important fact, notice of which had been duly published by the Government from time to time for a period of

more than two years, the *Shenandoah* would have entered the port of Two Harbors in safety as hundreds of other ships had entered it at all times of the day and night during the preceding four months of that season.

Captain McAvoy, in Navigating the Great Lakes as Master of the Steamship Shenandoah and in Entering the Ports along those Lakes as Occasion Required, was Acting in a Dual Capacity, viz, As an Ocean Pilot and as a Harbor Pilot.

There is a broad distinction between an ocean pilot, one who is compelled to direct the course of a ship mainly by compass reckoning and astronomical observations, and a river or harbor pilot who relies not so much upon the compass as upon his familiarity with the natural objects and lights along the river and harbors with which he is supposed to be familiar. Captain McAvoy, as navigating officer of the *Shenandoah*, acted as ocean pilot while navigating his ship by compass and reckoning on the broad waters of Lake Superior. He also acted as a harbor pilot when he assumed to navigate his ship into such ports as Duluth, Superior, the Soo, Erie, Buffalo, and Two Harbors. In the case of *Atlee* v. *Packet Company* (21 Wall., 389, 396), Mr. Justice Miller, in delivering the opinion of the court, said:

> The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. In this latter

case a knowledge of the rules of navigation, with charts which disclose the places of hidden rocks, dangerous shores, or other dangers of the way, are the main elements of his knowledge and skill, guided as he is in his course by the compass, by the reckoning, and the observations of the heavenly bodies, obtained by the use of proper instruments. It is by these he determines his locality and is made aware of the dangers of such locality, if any exist. But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently erected in the course of the river, as sand bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand bars newly made, of logs or snags, or other objects newly presented, against which his vessel might be

> injured. * * * It may be said that this is exacting a very high order of ability in a pilot. But when we consider the value of the lives and property committed to their control, for in this they are absolute masters, the high compensation they receive, and the care which Congress has taken to secure by rigid and frequent examinations and renewal of licenses, this very class of skill, we do not think we fix the standard too high.

When Captain McAvoy, therefore, assumed to act in the capacity of a harbor pilot in entering the port of Two Harbors on the night of the 24th of July, 1901, the law imposed upon him the duty of being acquainted and familiar with all the dangers that were permanently erected or in process of construction at the mouth of such harbor. As was said by this court in the case above cited, he was required to be constantly informed of changes occurring from time to time, and other objects newly presented against which his vessel might be injured. But notwithstanding this duty Captain McAvoy disregarded all sources of information through which he could have become acquainted with the conditions at the entrance of this harbor, and attempted to enter it on a dark and boisterous night upon the assumption that the conditions were the same as they had been when he last entered the harbor more than a year previous. It would seem that these facts *per se* are sufficient to establish the culpable negligence of Captain McAvoy on the night in question.

Captain McAvoy is brought within the rule exacting a very high order of ability in a pilot as announced by this court in Atlee v. Packett Company, supra, by reason of the fact that at the time of the accident he was a duly licensed pilot and master under the laws of the United States.

Section 4401 of the Revised Statutes contains, among other things, the following provisions:

> All coastwise seagoing vessels and *vessels navigating the Great Lakes* shall be subject to the navigation laws of the United States when navigating within the jurisdiction thereof. (The italics are mine.)

Section 4438 of the Revised Statutes makes it unlawful for any person to serve as a master, chief mate, engineer, or pilot of any steamer of over seven hundred tons who is not licensed by the Government. This section is as follows:

> The boards of local inspectors shall license and classify the masters, chief mates, and second and third mates, if in charge of a watch, engineers, and pilots of all steam vessels, and the masters and chief mates of sail vessels of over seven hundred tons and all other vessels and barges of over one hundred tons burden carrying passengers for hire. It shall be unlawful to employ any person, *or for any person to serve, as a master*, chief mate, engineer, *or pilot* of any steamer, or as master or chief mate of any sail vessel of over seven hundred tons who is not licensed by the inspectors; and anyone vio-

lating this section shall be liable to a penalty of one hundred dollars for each offense. (The italics are mine.)

Under the following provisions of the Federal Statutes Captain McAvoy was entitled, if competent, to hold a license in a *dual capacity*, that is to say, *as a master and as a pilot:*

Laws of the United States relative to the licensing of masters and pilots.

SEC. 4439. (License of captain.) Whenever any person applies to be licensed as master of any steam vessel, or of a sail vessel of over seven hundred tons, the inspectors shall make diligent inquiry as to his character, and shall carefully examine the applicant as well as the proofs which he presents in support of his claim, and if they are satisfied that his capacity, experience, habits of life, and character are such as warrant the belief that he can safely be intrusted with the duties and responsibilities of the station for which he makes application, they shall grant him a license authorizing him to discharge such duties on any such vessel for the term of five years; but such license shall be suspended or revoked upon satisfactory proof of bad conduct, intemperate habits, incapacity, inattention to his duties, or the willful violation of any provision of this title applicable to him.

SEC. 4442. (License of pilot.) Whenever any person *claiming to be a skillful pilot* of

steam vessels offers himself for a license, the inspectors shall make diligent inquiry as to his character and merits, and if satisfied, from personal examination of the applicant, with the proof that he offers, that he possesses the requisite knowledge and skill and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license, but such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, inattention to the duties of his station, or intemperance, or the willful violation of any provision of this Title. (Italics are mine.)

SEC. 4443. (License of captain or mate as pilot.) Where the master or mate *is also pilot* of the vessel, he shall not be required to hold two licenses to perform such duties, but the license issued shall state on its face *that he is authorized to act in such double capacity*. (The italics are mine.)

The act of May 28, 1896, c. 255, 29 Stat., 188, contains the following provision:

SEC. 2. That all licenses issued to such officers (section 1 specifically mentions masters and pilots) shall be for a term of five years, but the holder of a license may have the same renewed for another five years at any time before its expiration.

Certain rules and regulations prescribed by the board of supervising inspectors of steam vessels, duly approved by the Secretary of the Treasury and having the force of law as provided in section 4405 of the Revised Statutes.

The general rules and regulations prescribed by the board of supervising inspectors of steam vessels, as amended and issued and published in the month of January, 1901, and in force at the time of the collision in controversy, contained, among other things, certain provisions relative to masters and pilots which are important as bearing upon the question as to whether Captain McAvoy was a *duly licensed pilot* at the time of the accident.

> 6. The navigation of every steamer above one hundred tons burden shall be under the control of a *first-class pilot*, and every such pilot shall be limited in his license to the particular service for which he is adapted. Special pilots may also be licensed for small steamers of all kinds locally employed. (General rules and regulations of the board of supervising inspectors of steam vessels of January, 1901, p. 63.)

It is further provided, on page 65 of the general rules and regulations above referred to, that—

> Whenever a master or mate *desires to act as pilot and furnishes the necessary evidence of his ability*, the local inspectors for the district where the license is issued shall indorse such pilot routes on the master's or mate's certificate.

these regulations had been in force for more than five years prior to 1901, as shown by the general rules and regulations prescribed by the board of supervising inspectors of steam vessels issued and published in the month of January, 1897.

We have cited these provisions of the Federal statutes relative to the licensing of masters and pilots and the rules and regulations of the board of supervising inspectors of steam vessels for the purpose of showing that in the absence of proof to the contrary *a presumption* arises that Captain McAvoy was at the time of the accident not only *a duly licensed master*, but also a duly licensed *first-class pilot* under the laws of the United States and the rules and regulations of the board of supervising inspectors of steam vessels.

It is conceded that at the time of the accident Captain McAvoy was the master of the steamship *Shenandoah*. It will also be conceded that he was *acting as the pilot* of that ship at the time the collision occurred. He himself testified that he was in the pilot house at the wheel in charge of the navigation of the ship at the time of the collision. It does not appear from the evidence that there was any other officer on board the *Shenandoah* who was a licensed pilot. Section 4438 of the Revised Statutes, above quoted, declares that it shall be unlawful for any person to serve as a *master*, chief mate, engineer or *pilot* of any steamer of over seven hundred tons burden who is not licensed by the inspectors. Sections 4439 and 4433 of the Revised

statutes, above quoted, provide that where the master of a vessel is also the pilot that he shall not be required to hold two licenses to perform such duties, but that the license shall state on its face that he is authorized to act in *such dual capacity*.

The regulations above quoted are even more explicit. By the first of these regulations the navigation of the steamship *Shenandoah* was required to be *under the control of a first-class pilot*. The second of these regulations, above quoted, clearly contemplates that whenever a master desires *to act as pilot*, which was the case with respect to Captain McAvoy, *and furnishes the necessary evidence of his ability*, the local inspectors for the district in which his license was issued shall indorse such pilot routes on the master's certificate. We, therefore, have a case in which the master, John McAvoy, *was acting as the pilot* of his vessel on the night in question, and for aught that appears from this record always had acted as the pilot of the *Shenandoah*. Our contention is that it will be *presumed*, in the absence of any proof to the contrary, that he was duly licensed by the Government to act in *such dual capacity*, to wit, as a master and as a first-class pilot. We submit the following authorities in support of this proposition:

Butler v. Boston Steamship Company, 130 U. S., 527, 554.

> The question then arises whether the defense made by the appellants in the cause of limited liability instituted by the owners of the steamship is a good defense, as set

forth in the pleadings and the agreed statement of facts. The main allegation relied on by the appellants to bring the case within the steamboat inspection law is, that the second mate was in charge of the vessel at the time of the accident, and that he was not a licensed pilot. The libellant owners deny this, and claim that it is immaterial if true. There is no proof on the subject. But suppose it were admitted to be true, how could the owners have prevented the second mate from being in charge? By virtue of his office and the rules of maritime law the captain or master has charge of the ship and of the selection and employment of the crew, and it was his duty, and not that of the owners, to see that a competent and duly qualified officer was in actual charge of the steamer when not on the high seas. It is not alleged that the captain himself and the first mate were not regularly licensed pilots. They usually are such on all seagoing steamers; and in the absence of any allegation to the contrary, it will be presumed that they were so licensed.

In re Meyers et al, 74 Fed. Rep., 881, 891.

Section 4401, Revised Statutes of the United States, provides that every coastwise seagoing steam vessel shall "be under the control and direction of pilots licensed by the inspector of steamboats." Section 4443 provides: "Where the master or mate is also pilot of the vessel he shall not be required to hold two licenses to perform

such duties, but the license issued shall state on its face that he is authorized to act in such double capacity." Upon these provisions of the statute it is argued by respondents that Captain Lucas was incompetent, because it was not affirmatively shown that he was a licensed pilot or that a licensed pilot was in charge of the vessel. The facts are that no evidence whatever was given by either party upon this point. Captain Lucas was a witness for the respondents. No question was asked as to whether he was a licensed pilot. Upon these facts the court will be justified in presuming that he was a licensed pilot. In Butler *v.* Steamship Co. (130 U. S., 528, 554; 9 Sup. Ct., 612) the court held that in the absence of any allegations to the contrary it will be presumed, in a limited liability case in admiralty, that the captain and the first mate of a seagoing coastwise steamer are licensed pilots. The presumption is that the law in this respect was complied with, and the burden is cast upon the respondents to prove to the contrary; and, not having offered any evidence upon the subject, they can not claim that Captain Lucas was not a licensed pilot.

While these cases above cited refer to section 4401 of the Revised Statutes, the principle of the cases relative to the law of presumption would seem to be applicable with equal force to the case at bar. Section 4443 contemplates that a master may act as a pilot of his own vessel and does not

impose upon him the burden of obtaining two licenses to perform such duties, but provides that the license issued shall state upon its face that he is authorized to act in such double capacity. Captain McAvoy was acting in such double capacity, as shown by the evidence. It will, therefore, be presumed that he had the lawful and legal right to so act and that he held a license both as a master and as a pilot.

Not only does this strong presumption arise that Captain McAvoy held a license as a first-class pilot, but as a matter of fact he was so licensed in the month of September, 1897. Section 4411 of the Revised Statutes requires the board of supervising inspectors to establish such regulations as may be necessary to make known in a proper manner to local inspectors the names of all persons licensed as masters, mates, engineers, and pilots. Under authority contained in that section the Treasury Department of the Government for many years prior to 1903 published annual reports containing lists of masters, mates, engineers, and pilots of merchant, steam, and other motor vessels during each year ending on the 31st of December.

That publication for the year ending December 31, 1897, gives the name of *John McAvoy* as a licensed *master and pilot* and shows that a license was issued to him as such master and pilot on the 17th day of September, 1897, the number of his license being 6832. Such license was issued in the ninth supervising local district at Buffalo,

N. Y., and was good for a period of five years unless sooner revoked. These publications and reports of the Treasury Department for more than six years prior to the 1st day of January, 1902, do not give the name of any other John McAvoy who was *licensed in such dual capacity, to wit, as a master and pilot.*

We have taken the trouble to go into this matter at length for the sole purpose of showing to this court that the very exacting rule of high order of ability in a pilot as announced by Mr. Justice Miller in *Atlee* v. *Packet Company*, *supra*, should be applied in determining whether the conduct of Captain McAvoy in failing to inform himself as to the conditions at the entrance of Agate Bay before attempting to enter it was consistent with his duty as a prudent and careful mariner.

II.

THE GOVERNMENT WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

It will, of course, be conceded that the Government had the right to construct and maintain this extension to the breakwater at the entrance of Agate Bay, and that the officers of the War Department and the Government contractor were lawfully engaged in the prosecution of this improvement. It is contended, however, that the officers under whose supervision this breakwater was being constructed failed and neglected to give sufficient warning to mariners navigating the Great

Lakes as to the existence of this obstruction, and particularly in failing and neglecting to maintain a red light in lieu of a white light on the southwesterly end of the improvement; that such negligence on the part of the officers and agents of the Government contributed to the injury complained of, and for that reason the Government is not entitled to a judgment in this lawsuit. Let us again refer to the record for the purpose of ascertaining precisely what precautions were taken by the officers of the Government to advise and warn mariners of danger upon entering this harbor.

As early as July, 1899, a pamphlet was issued from the Hydrographic Office of the Navy Department entitled "Notice to Mariners" (Plaintiff's Exhibit B), wherein it was stated that the Government proposed to construct, during the ensuing year, this very improvement, of which Captain McAvoy had no knowledge up to the time that the collision occurred. In the month of August, 1900, a similar notice was issued to mariners (Plaintiff's Exhibit C), warning masters of vessels of the existence of this improvement and cautioning them upon entering the harbor of Agate Bay, to give the old breakwater a berth of 300 feet and not to round the east breakwater close on board as formerly, on account of this danger. On the 1st day of April, 1901, nearly three months prior to the accident, a bulletin was issued and published (Government's Exhibit D), by the Chief of Engineers of the

United States Army at Washington, in which it was stated that vessels should keep 300 feet away from the outer end of the east breakwater. All of these bulletins, except the last, were mailed to Captain McAvoy at his Detroit address, but as he testified, he paid very little, if any, attention to them. In addition to this information, the Government issued and published a chart of Two Harbors on the opening of navigation in the year 1901, upon which chart was plainly outlined the improvement in controversy (Government's Exhibit A). We desire to point out, in passing, that Captain McAvoy failed to avail himself of any of this information.

In addition to the precautions thus specified, the contractor was required by the terms of his contract with the Government to maintain a white light on the outer extremity of the improvement during the progress of the work until it was finally inspected and accepted by the Government. The reasons assigned for maintaining a white light were (1) that a white light could be seen at a greater distance, and (2) that for many years it had been customary to maintain a white light on Government improvements on the Great Lakes, and that mariners were familiar with such practice. The Government produced a number of witnesses upon the trial who testified that it had been the custom for years to designate piers, breakwaters, and other improvements under proc-

ess of construction by a white light. The following are excerpts taken from such testimony:

Samuel Wetton, a Government witness, who had been employed by contractors as a carpenter on Government work and who was engaged in the work of the improvement of the east breakwater at the entrance to Agate Bay during the summer of 1901, testified as follows (Rec., pp. 32, 33):

> Q. How many different improvements and different works upon the lake have you been engaged in the last ten or fifteen years?
>
> A. I do not know; I could count them up, though.
>
> Q. About how many?
>
> A. Twelve to fourteen different ones.
>
> Q. Do you know what the character of the light was that is used as a warning or danger signal upon these works you have been engaged in?
>
> A. Yes, sir.
>
> * * * * *
>
> Q. You may state what it was.
>
> A. When I stated twelve or fourteen, I didn't mean Government jobs.
>
> Q. You mean Government jobs?
>
> A. I think I was on about nine Government jobs; maybe ten would be right. I have not always had charge of these works; I have worked on them.
>
> Q. Well, what is the nature of the light?
>
> A. It has always been a clear light.
>
> Q. It has always been a clear light?
>
> A. It has always been a clear light; yes, sir.

John Krey, a Government witness, and an assistant engineer in the United States Army, who was in immediate charge of the construction of the new breakwater with which the steamer *Shenandoah* collided, testified (Rec., pp. 38, 39), as follows concerning his interview with Captain McAvoy on the morning after the accident and the character of lights maintained on Government improvements:

> Q. You saw Captain McAvoy the next day?
>
> A. I saw Captain McAvoy the next morning.
>
> Q. What conversation did you have with him about the cause of the accident?
>
> A. Well, sir, I boarded his vessel after I had ascertained to my own satisfaction that his boat had done the damage; I entered his cabin with two witnesses I took along with me, Mr. Wetton and Mr. Powell. I simply said, "Good day, Captain, I believe you ran into the breakwater last night," and he said, "Yes, I did." I asked him if he had any excuse to offer, and he said no, he had none. The only excuse he had to offer was he was not aware of the improvement. He said it was blowing pretty fresh from the northeast and he mistook the white light. He said he saw the white light and mistook it for the light of a vessel dragging her anchor. He said he did; that is all I said.
>
> Q. You were the assistant engineer?
>
> A. Yes, sir.

Q. What was your duty with regard to these cribs when they were completed?

A. Well, I superintended them.

Q. How long have you been engaged in superintending or interested in the improvements and Government works upon Lake Superior, or upon the Great Lakes, the northern lakes?

A. For six years.

Q. During that time do you know what kind of lights the Government officers or the contractors—I mean Government officers—put out as signals for mariners upon those works that are in process of construction?

A. Yes, sir.

Q. What kind of a light do they put out?

A. *White lights.*

Q. Did you ever see, in the whole course of your work, any other light than a white light upon Government work in the process of construction upon the Great Lakes?

A. No, sir; I don't remember.

Capt. David D. Gaillard, a Government witness and a captain in the Corps of Engineers of the United States Army, in charge of the works of river and harbor improvements on the American shores of Lake Superior during the year 1901, testified as follows regarding the lights used on pier and breakwater work under his supervision and control.

Q. What works or improvements were made in those harbors during the time you were stationed at Duluth?

A. At Grand Marais, Minn., at Agate

Bay, Minnesota, Duluth-Superior Harbor, and at the Portage Lake Canal.

Q. What was the character of the improvements made?

A. It was a breakwater construction at Grand Marais, Minn., and at Agate Bay, Minnesota, dredging and pier work in Duluth-Superior Harbor, and breakwater constructions and dredging at Portage Lake Canal.

Q. You are not a sailor yourself, and never have been?

A. I do not claim to be a sailor.

Q. Captain, state what kind of a light was displayed upon this new work that you have described having been performed during the time you were located here at Duluth.

A. In each of these four cases the light was a *white light*.

(Rec., pp. 51, 52.)

A. R. Porter, a Government witness, engaged in the business of contractor on Government work and who had worked on the breakwaters at Two Harbors, testified as follows concerning the lights used on the work (Rec., p. 71):

Q. Did you display any lights upon this work while it was under construction?

A. Yes, sir.

Q. What kind of a light?

A. A *white light*.

Q. For what purpose did you display that light?

A. I suppose it was to notify vessels that we were working there, and that the piers were under construction.

Maj. Walter L. Fisk, a Government witness, stationed at Detroit, Mich., who had charge of the survey of the northern and northwestern lakes during the year 1901, testified as follows concerning the lights placed upon the work under construction in the harbors upon Lake Superior (Rec., p. 75):

> Q. Do you know, Major, from your personal observation what the custom is as to the kinds of lights that are placed upon the work under construction in the harbors upon Lake Superior?
>
> A. I do.
>
> Q. What character of light is used customarily?
>
> A. Almost universally the light on construction work is *white*.
>
> Q. A *white* light.
>
> A. Yes, sir.
>
> Q. Do you know how long that light has been used for that purpose?
>
> A. *It has been used since I have known anything about river and harbor work, and that is some twenty years.*

Hugh Steele, a Government witness, and a contractor on harbor work for the Government, testified as follows concerning the lights displayed on work under construction (Rec., p. 78):

> Q. Now, Mr. Steele, I will ask you generally regarding this work whether you displayed a signal or warning light on the work during its progress of construction?

A. I have always, where we were near a channel. I have done some work away from a channel where there was no possible chance for a steamboat to strike it, but any time we were near a channel we would display a light for our own protection and according to the specifications.

Q. That is, whenever your work was out in a channel where a vessel was liable to sail you would display a light?

A. Yes, sir.

Q. What was the kind of light that you displayed?

A. A *white light.*

Q. Did you display any other kind of a light as a signal light?

A. No, sir.

F. B. Tims, a Government witness and a contractor on Government work, testified as follows concerning the lights used on work under construction (Rec., p. 79):

Q. You are a contractor?

A. Yes, sir.

Q. And have done contracting work for the Government?

A. Yes, sir.

Q. Building breakwaters?

A. Yes, sir.

Q. Where?

A. We built some breakwater at Ashland, Port Wing, Presqu'isle, and Marquette.

Q. Between what years was this work done?

A. It has all been done in the last five years.

Q. Did you use any lights on this work?

A. I did.

Q. What kind of a light?

A. A *white light.*

Q. Why did you use a white light?

A. More from custom than anything else I know of.

(Cases on the question of the effect of custom and usage: *The City of Washington*, 92 U. S., 31; *Adams* v. *Otterback*, 15 How., 539; *The Alaska*, 33 Fed. Rep., 107.)

With this testimony before the court and jury can it be said as a matter of law that the Government was guilty of contributory negligence and that the trial court should have directed the jury to return a verdict in favor of the defendant? The Government contends that every reasonable precaution was taken to warn mariners of the existence of this obstruction, and that under the facts as disclosed by this record the court below very properly submitted the question of contributory negligence to the jury under proper instructions, and that this court will not assume to reexamine the facts which have been tried by the jury under instructions correctly defining the legal rights of the parties.

The following cases establish beyond controversy that where contributory negligence is alleged by the defendant such question is to be determined by the jury, unless no recovery could be had upon any view of the case.

Railroad Company v. *Fraloff*, 100 *U. S.*, 24, 31.

This was a writ of error to review a judgment against the New York Central and Hudson River Railroad Company in an action by one Fraloff to recover the value of certain articles of wearing apparel alleged to have been taken from her trunk while she was a passenger upon the cars of the defendant company.

Mr. Justice Harlan, in delivering the opinion of the court, said:

> Looking at the whole scope and bearing of the charge, and interpreting what was said, as it must necessarily have been understood both by the court and jury, we do not perceive that any error was committed to the prejudice of the company, or of which it can complain. No error of law appearing upon the record, this court can not reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefore rested with the court below under its general power to set aside the verdict. But that court, finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for new trial. Whether its action, in that particu-

lar, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. *Our authority does not extend to a reexamination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.* (*Parsons* v. *Bedford*, 3 Pet., 446; 21 How., 167; *Insurance Company* v. *Folsom*, 18 Wall., 249.)

***Kane* v. *Northern Central Railway Company*. 128 U. S., 91, 94.**

This was an action to recover damages for personal injuries sustained by the plaintiff in error in the discharge of his duties as an employee of the Northern Central Railway Company. It was based upon the negligence of the company in not providing suitable and safe appliances for the cars on which the plaintiff was assigned for duty. At the conclusion of the evidence introduced in his behalf the court directed a verdict for the railway company. The case was brought to this court upon a writ of error.

Mr. Justice Harlan, speaking for the court, said:

The circuit court proceeded upon the ground that contributory negligence upon the part of the plaintiff was so conclusively established that it would have been compelled, in the exercise of a sound judicial discretion, to set aside any verdict returned in his favor. If the evidence, giving the plaintiff the benefit of every inference to be fairly drawn from it, sustained this view, then the direction to find for the defendant

was proper. (*Phœnix Insurance Co.* v. *Doster*, 106 U. S., 30, 32; *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S., 478, 482; *Anderson County* v. *Beal*, 113 U. S., 227, 241; *Goodlet* v. *Louisville & Nashville Railroad*, 122 U. S., 391, 411.)

But we are of opinion that the question of contributory negligence should have been submitted to the jury. It can not be said that the plaintiff was guilty of contributory negligence in staying upon the train, in the capacity of brakeman, after observing that a step was missing from one of the cars over which he might pass while discharging his duties. An employee upon a railroad train, likely to meet other trains, owes it to the public, as well as to his employer, not to abandon his post unnecessarily. Besides, the danger arising from the defective car was not so imminent as to subject him to the charge of recklessness in remaining at his post under the conductor's assurance that the car should be removed from the train when it reached the coal yard or junction, if, upon examining his manifests, he found that it did not contain perishable freight. (*Hough* v. *Railroad Co.*, 100 U. S., 224; *District of Columbia* v. *McElligott*, 117 U. S., 621, 631.)

***Dunlap* v. *Northeastern Railroad Company*, 130 U. S., 649, 652.**

This was an action on the case brought by Dunlap against the Northeastern Railroad Company to recover for injuries received, by reason of a train

belonging to the company leaving the track, while Dunlap was acting as engineer. The Circuit Court directed the jury to return a verdict for the railroad company. The case was appealed to this court.

Mr. Chief Justice Fuller, in delivering the opinion, said:

> The Circuit Court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish. (*Kane* v. *Northern Central Railway*, 128 U. S., 91; *Jones* v. *East Tennessee, Virginia & Georgia Railroad Co.*, 128 U. S., 443.)

Richmond & Danville Railroad Co., v. Powers, 149 U. S., 43, 44, 47.

This was an action brought to recover damages for injuries sustained by being run over by a train belonging to the railroad company, which resulted in a verdict in favor of the plaintiff. The case was brought to this court by the railroad company on a writ of error.

Mr. Justice Brewer, in delivering the opinion of the court, said:

> The only error assigned is in the refusal of the court to instruct the jury as requested, substantially that the deceased was guilty of such contributory negligence as to prevent a recovery. It is well settled that where there is uncertainty as to the existence of

either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them. (*Railroad Co.* v. *Stout*, 17 Wall., 657; *Washington & Georgetown Railroad* v. *McDade*, 135 U. S., 554; *Delaware & Lackawanna Railroad* v. *Converse*, 139 U. S., 469.)

* * * * *

But, of course, all conflict in the testimony was settled by the jury, and could not be determined by the court, and unless it were affirmatively shown that the deceased, when he left the car, and started toward the eating house, knew that he was walking along a track, and that there was danger from another train, and with such knowledge neither looked nor took precautions to satisfy himself whether there was present danger therefrom, it surely can not be held that there was, as a matter of law, contributory negligence on his part.

***Alaska Steamship Company* v. *Collins*, 127 Fed. Rep., 937, 940.**

This was an action to recover damages for alleged injury to a wharf owned by the defendant in error, caused by the negligence of the steamer *Dirigo*, owned by the plaintiff in error. The case was tried before a jury, and resulted in a verdict for the plaintiff in the court below. The steamship company appealed the case to the Circuit Court of

Appeals for the Ninth Circuit. District Judge Hawley, in delivering the opinion of that court, said:

> The conflict raised by the testimony was a matter which the court properly submitted to the jury. The general rule is well settled that the plaintiff is entitled to have the question submitted to the jury unless no recovery could be had upon any view which could be properly taken of the facts which the evidence tended to establish. (*Kane* v. *Northern Central Ry. Co.* 128 U. S., 91, 9, Sup. Ct. 16, 32 L. ed., 339; *Dunlap* v. *Northeastern R. Co.*, 130 U. S., 649, 652, 9 Sup. Ct. 647, 32 L. ed., 1058; *L. & N. R. Co.* v. *Woodson*, 134 U. S., 614, 621, 10 Sup. Ct. 628, 33 L. ed., 1032; *Washington Railroad Co.* v. *McDade*, 135 U. S., 554, 571, 10 Sup. Ct. 1044, 34 L. ed., 235.)

***Chicago Great Western Railway Company* v. *Price*, 97 Fed. Rep., 423, 428.**

That was an action brought by the administratrix of one Price to recover for injuries sustained by the intestate, and which resulted in his death while an employee of the company. The case was tried and a judgment rendered against the railway company for $3,500, whereupon the company took the case upon a writ of error to the Circuit Court of Appeals for the Eighth Circuit.

Circuit Judge Sanborn, in delivering the opinion of the court, said:

> But it is equally well settled that it is only when the evidence leaves the material facts admitted or undisputed, and only when these

facts are such that reasonable men, in the exercise of an honest and impartial judgment, can fairly draw but one conclusion from them, that the court may properly withdraw the case from the jury. If the evidence relative to material facts is contradictory, or if, from the admitted or established facts, the unprejudiced minds of reasonable men may well draw different conclusions, it is the duty of the court to submit the issues to the jury. (*Railway Co.* v. *Jarvi*, 10 U. S. App., 439, 451, 3 C. C. A., 433, 438, and 53 Fed., 65, 70; *Fuel Co.* v. *Danielson*, 12 U. S. App., 688, 696, 6 C. C. A., 636, 640, and 57 Fed., 915, 920; *Drake* v. *Stewart*, 40 U. S. App., 173, 178, 22 C. C. A., 104, 107, and 76 Fed., 140, 143; *Railway Co.* v. *Ives*, 144 U. S., 408, 417, 12 Sup. Ct., 679; *Railroad Co.* v. *Converse*, 139 U. S., 469, 11 Sup. Ct., 569; *Railroad Co.* v. *Pollard*, 22 Wall., 341.)

Cases cited by Counsel for Plaintiff in Error, in Support of their Contention that the Government was Guilty of Contributory Negligence, Referred to and Distinguished.

In support of their contention that the Government was guilty of contributory negligence counsel for the plaintiff in error cite a number of cases in their brief. From a careful examination of these cases it appears that there are only three cases cited in which there was not some law specifying the character of the light which should be displayed and where it should be located. The three cases referred to are clearly distinguishable from the case at bar.

Casement v. *Brown*,
148 U. S., 615.

This was an action to recover the value of certain barges destroyed by reason of a collision with certain piers constructed for a bridge over the Ohio River in West Virginia. The facts were that one of the piers was submerged by high water and the buoy that had been kept upon that pier during the day time had been washed away. The contractors had knowledge of this fact, yet no attempt was made to replace it, although they had ample time to do so before the collision occurred. It did not appear that they took any other precaution or made any attempt to notify mariners of the existence of the submerged pier. This court held under the facts in that case that the defendants were liable for the injuries which were caused by their own negligence.

Harrison v. *Hughes et al.*,
110 Fed. Rep., 545.

This case was a libel in admiralty by the master of the British steamship *Glenochil* against Hughes Brothers & Bangs to recover damages for injuries sustained to that vessel as a result of a collision with the new breakwater off Lewes, near the mouth of Delaware Bay, which occurred at about 1 o'clock in the morning on November 30, 1897. At the time of the accident the new breakwater, which was an extension of the old breakwater, was in course of construction by the defendants under a contract with the Government. In this case, as in the case at bar, the contract provided that a

light should be erected and maintained by the contractors on the breakwater while in process of construction. It appeared from the evidence that the light which was required to be maintained by the contractors at the end of the new breakwater was not burning at the time of the accident, it having been extinguished by high winds. It further appeared that the contractors knew that this had happened on prior occasions, and that they took no steps to remedy such defect. At the time of the accident, therefore, no light whatever was burning at the end of the extension to the breakwater as a warning to mariners. The court held that the contractors were guilty of negligence and that the pilot was also guilty of negligence, and thereupon apportioned the damages equally between the parties.

United States v. *Charles G. Dunn & Co.*,
124 Fed. Rep., 705, 707.

This was an action at law brought by the United States to recover damages to a Government pier in the Delaware River as a result of a collision with the pier by a steam vessel. The pier was 50 feet wide by 250 feet long, its outer end being protected from the ice by an ice break 75 feet in length. The pier was lighted at night by a white light. The night was dark and the only light that was displayed on the pier could not be seen from the position to which the vessel had been forced. The pier was probably not more than 200 or 300 yards away when its outlines were seen and the situation,

as the court said, evidently presented nothing but a choice of two evils, to wit, a collision with the tug or with the pier. Under such circumstances the court held that the prompt decision of the pilot was correct, as nothing else could have been prudently done. Judge McPherson said:

> It must be presumed that, as a licensed branch pilot, he knew that he was in the neighborhood of the quarantine station, and that the pier was an obstacle that must be avoided. But I do not think he was bound, at his peril, to know in the dark within a few yards precisely where a relatively small, invisible, and *unlighted* object was to be found. If he had had the aid that is now afforded by the light on the southern end of the pier, and had thus been warned a little sooner, so that precautions might have been taken—even five or ten minutes earlier—I have little doubt that the collision would have been avoided. As it was, he found himself in a position of peril without fault of his own and was forced to choose one of two dangers. If he made an error of judgment under such circumstances I do not think it should be reckoned as actionable negligence.

We respectfully submit that in no one of these cases are the facts analogous to the case at bar, and that the judgment of the Circuit Court of Appeals for the Eighth Circuit should be affirmed.

MILTON D. PURDY,
Assistant to the Attorney-General.

O

Supreme Court of the United States.

No. 220.—October Term, 1906.

Davidson Steamship Company, Plaintiff in Error, vs. The United States of America. } In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 25, 1907.]

Mr. Justice Brewer delivered the opinion of the Court.

On April 1, 1902, the United States commenced this action in the Circuit Court of the United States for the District of Minnesota to recover for injuries charged to have been done through the negligence of the Davidson Steamship Company to a Government breakwater at Two Harbors, Lake Superior. The defendant answered, denying the negligence and alleging that the result was due to the negligence of the Government, the plaintiff. No question was made as to the amount of the injury. Trial was had before a jury, which returned a verdict for the Government. Judgment thereon was entered by the Circuit Court. This judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit, and from that court brought here on writ of error.

In a general way, the facts are that on the night of July 24, 1901, the steamer Shenandoah, the property of the steamship company, ran into the Government breakwater at Two Harbors, Minnesota. Agate Bay, Lake Superior, is the harbor of the village of Two Harbors, and is an open bay, across the mouth of which there are breakwaters extending from either shore, running in an easterly and westerly direction, and leaving an open space as an entrance to the iron ore and other docks in the bay. The breakwater extending from the easterly side had been constructed for a number of years, extending into the bay for a distance of about seven hundred and fifty feet, and its outer end indicated in the night time by a fixed, large red light, fifteen or twenty feet high. In 1899 the Government projected an extension of this breakwater of about three hundred feet in length, and at an angle of forty-five degrees from the original breakwater. At the time of the injury this extension, composed of wooden cribs filled with stone, had been carried to its full length, but not built up to its intended height, and, in fact, rising only a few inches above the surface of the water. On the extreme outward end of the new extension was a

mast or pole about twelve feet high, and on it was hung an ordinary white light or lantern. The original fixed red light on the old breakwater had been moved back some thirty feet, in order that the new work could be properly joined to the old.

On the evening named the Shenandoah loaded a cargo of iron ore at Superior, Wisconsin, and proceeded to Two Harbors, to take in tow a barge that was being loaded there. When the vessel left Superior the night was dark and stormy and the sky covered with clouds, with a heavy wind blowing from the northeast, making a high sea. Arriving off Two Harbors at about 11 o'clock, the steamer headed for the entrance, intending to enter port, as she had formerly done, close to the easterly breakwater. When she had approached within about two hundred feet the surf was seen breaking over the extension of the breakwater. Her engines were promptly stopped and reversed, but, notwithstanding this, she struck this extension about one hundred and twenty-five feet from the fixed red light, and did considerable damage to it, but without injury to herself. The port of Two Harbors is on the north side of Lake Superior, about twenty-seven miles from Duluth, and one of the most important iron ore loading points on the Great Lakes.

Now, whether the injury was the result of negligence, and which party was guilty of negligence, are questions of fact properly determinable by a jury. These questions are the only ones discussed by counsel for the steamship company, and therefore to them alone we direct our attention. It is true in the assignment of errors some other matters are named, but they are not called to our attention in brief or argument, and an examination of them shows that very properly counsel for the steamship company considered them not sufficiently important to justify any discussion.

It is well, before noticing the testimony, to consider the extent to which our inquiry may properly go. The settled rule is that where negligence is a mere question of fact, and nothing appears which is negligence *per se*, the determination of the question is peculiarly the province of a jury, and its conclusions will not be disturbed unless it is entirely clear that they were erroneous. Courts do not approach the question as an original one and consider whether, in their judgment, the testimony does or does not prove negligence, but accept the determination of the jury, if there is any evidence upon which it can be rested. This is the general rule in respect to all mere questions of fact. Authorities in this court, as well as in others, are abundant and clear on this point. It is sufficient to refer to one or two.

Railroad Company v. *Stout*, 17 Wall. 657, was an action to recover damages in behalf of a boy six years of age for injuries sustained upon a turntable belonging to the railroad company. This turntable was in an

open space, about eighty rods from the company's depot, in a village of from one hundred to one hundred and fifty persons. The railroad ground was not enclosed or visibly separated from the adjoining property, and was about three-quarters of a mile distant from the house of the child's parents The boy, with two older boys, went to the turntable and commenced playing on it. It was not attended or guarded by any servant of the company It was not fastened or locked, and revolved easily on its axis. While so playing he was injured. The jury found the company guilty of negligence. In affirming the judgment this proposition was stated (664):

"It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

In *Railroad Company* v. *Fraloff*, 100 U. S. 24, 31, one question was as to the value of property for which the company was responsible. Sustaining a judgment against it, we said:

"If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefor rested with the court below, under its general power to set aside the verdict. But that court finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for a new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties. *Parsons* v. *Bedford*, 3 Pet. 446; 21 How. 167; *Insurance Company* v. *Folsom*, 18 Wall. 249."

In *Dunlap* v. *Northeastern Railroad Company*, 130 U. S. 649, 652, this was the ruling:

"The Circuit Court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish. *Kane* v. *Northern Central Railway*, 128 U. S. 91; *Jones* v. *East Tennessee, Virginia & Georgia Railroad Co.*, 128 U. S. 443."

In *Richmond & Danville Railroad Company* v. *Powers*, 149 U. S. 43, 45, the jury having found the railroad company guilty of negligence, we sustained the verdict and judgment, saying:

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them. *Railroad Co.* v. *Stout*, 17 Wall. 657; *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554; *Delaware & Lackawanna Railroad* v. *Converse*, 139 U. S. 469."

From these authorities, and many more of a kindred nature could be cited, it is obvious that the question for us to consider is whether there was testimony from which the jury might rightfully find the defendant guilty of negligence. It appears that the captain of the steamship had been for many years on the lakes, and that he was acting as pilot of the ship at the time of the collision. The harbor was one of great importance, although he had not been in it for over a year. He knew that harbor improvements on the Great Lakes were being made by the Government, that information of the condition of those improvements was given from time to time by circulars from the Departments, and still made no efforts to ascertain the then condition of the harbor, the only chart he had being an old one. In addition to the fact that he knew where information could be obtained, might have assumed that he would be likely to be sent to any one of the many important harbors, and ought to have prepared himself therefor, there was testimony that official circulars and notices were mailed to him at his post office address, although he states that he failed to receive them, and relied upon the knowledge which he had from his visit of more than a year theretofore and upon what he should find as he entered the harbor. Now there is an obligation on all persons to take the care which under ordinary circumstances of the case a reasonable and prudent man would take, and the omission of that care constitutes negligence. It was said by Mr. Justice McLean, delivering the opinion in *Culbertson* v. *Shaw et al.*, 18 How. 584, 587:

"When a steamer is about to enter a harbor great caution is required. There being no usage as to an open way, the viligance is thrown upon the entering vessel. Ordinary care, under such circumstances, will not excuse a steamer for a wrong done."

In *Atlee* v. *Packet Company*, 21 Wall. 389, 396, Mr. Justice Miller, commenting on the duty of a pilot of a river steamer, makes these observations:

"But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his

vessel. In the long course of a thousand miles in one of these rivers, he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as sand bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand bars newly made, of logs, or snags, or other objects newly presented, against which his vessel might be injured. In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity, his skilled knowledge, very seriously in the course of a long voyage."

It would not be strange if the jury found that a captain engaged in the navigation of the waters of Lake Superior was guilty of negligence in not keeping himself informed of changes going on from time to time in the different harbors which he was likely to be called upon to visit. His very want of knowledge, when he had the means of ascertaining the facts, could properly be regarded as negligence. Clearly it could not be held as matter of law not to be so.

It is true he was apparently misled by the lights on the breakwater, and we do not mean to intimate that there was no evidence from which the jury would have been warranted in finding that the Government was guilty of negligence in the way in which it left those lights. But no omission or negligence on the part of the Government avoids the fact that there was testimony from which the jury was justified in finding the captain guilty of negligence, and for that negligence the steamship company was responsible. The jury might have thought that if he had kept himself properly informed in reference to the condition of that as of other important harbors he would not have been misled by the condition of the lights. At any rate the verdict of the jury was against the contention of contributory negligence on the part of the Government, and the jury was the tribunal to determine this, as well as the question of negligence. We could not set aside the verdict of the jury, approved as it was by the trial court and the Court of Appeals, without ourselves exercising the function of triers of fact, when under the law such questions are committed to the determination of a jury.

The judgment is *Affirmed.*